TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 255 ~~1/4~~

THE PHILLIPS & COLBY CONSTRUCTION COMPANY, PLAINTIFFS IN ERROR,

vs.

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, J. O. RUTTER, AND ANDREW J. HOPPER, WHO SUE FOR THE USE OF M. T. SEYMOUR, ELIJAH S. ALEXANDER, AND J. O. RUTTER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 15, 1873.

SUPREME COURT OF THE UNITED STATES.

No. 255.

THE PHILLIPS & COLBY CONSTRUCTION COMPANY, PLAINTIFFS IN ERROR,

vs.

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, J. O. RUTTER, AND ANDREW J. HOPPER, WHO SUE FOR THE USE OF M. T. SEYMOUR, ELIJAH S. ALEXANDER, AND J. O. RUTTER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Præcipe for summons	2	1
Bond for costs	3	1
Summons	4	2
Declaration	7	3
Demurrer to declaration	96	32
Demurrer overruled, &c	99	34
Pleas of defendant	101	34
Demurrer to eleventh plea	120	39
Replications	122	40
Eleventh plea withdrawn and leave to amend, &c	133	43
Amended twelfth plea	134	43
Similiter and rejoinder	144	46
Replication to stand as to amended twelfth plea, jury empanneled, &c	145	46
Verdict, &c	153	49
Reasons for new trial	156	50
Motion overruled and judgment on verdict	158	51
Bill of exceptions	160	52
Bond	243	81
Order of approval	245	82
Certificate to transcript	246	82
Writ of error	247	83
Citation	249	83

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms, in the city of Chicago, in the district aforesaid, before the Hon. Henry W. Blodgett, district judge of the United States for said district, on Saturday, the nineteenth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the ninety-eighth year.

W'M H. BRADLEY, *Clerk.*

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, Joseph O. Rutter, and Andrew J. Hopper, who sue for the use of Mark T. Seymour, Elijah S. Alexander, and Joseph O. Rutter, *vs.* THE PHILLIPS & COLBY CONSTRUCTION COMpany. } Covenant.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

2 Be it remembered, that, on the seventeenth day of February, A. D. eighteen hundred and seventy-three, came the above-mentioned plaintiffs by their attorneys, and filed in the office of the clerk of said circuit court of the United States for said northern district of Illinois, at Chicago, in said district, their præcipe for a writ of summons against said defendants, and also, at the same time, filed their bond for costs in said entitled cause, which said præcipe and bond are respectively in the words and figures following, to wit:

Præcipe.

Circuit court of the United States, northern district of Illinois.

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, Joseph O. Rutter, & Alfred J. Hopper, who sue for the use of Mark T. Seymour, Elijah S. Alexander, & Joseph O. Rutter, pl'f, *vs.* THE PHILLIPS & COLBY CONSTRUCTION COMpany. } Præcipe.

3 SIR: Please issue a summons in an action of covenant broken, in the above-entitled action, returnable at the next term of said court. Plaintiffs' damage, $500,000.

Y'r's, &c.

SLEEPER & WHITON,
Plffs' Atty's.

Feb'y 17, 1873.
To the CLERK.

(Endorsed:) Filed Feb'y 17, 1873. W'm H. Bradley, cl'k.

Bond for costs.

Circuit court of the United States for the northern district of Illinois.

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, Joseph O. Rutter, & Alfred J. Hopper, who sue for the use of Mark T. Seymour, Elijah S. Alexander, & Joseph O. Rutter, *vs.* THE PHILLIPS & COLBY CONSTRUCTION COMpany.

We do hereby enter ourselves security for costs in this cause, and

acknowledge ourselves bound to pay, or cause to be paid, all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State.
4 Dated this 17th day of February, A. D. 1873.

SLEEPER & WHITON.

(Endorsed:) Filed this 17th day of Feb'y A. D. 1873. W'm H. Bradley clerk.

And thereupon, to wit, on the 17th day of February, A. D. 1873, a, summons issued out of said clerk's office, against said defendant in said entitled cause, which said summons, together with the return of the marshal thereon, is in the words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, *ss.*

The United States of America, to the marshal of the northern district of Illinois, greeting:

We command you to summon the Phillips & Colby Construction Company, if found in your district, to be and appear before our judges of our circuit court of the United States, for the northern district of Illinois, on the first day of the next term thereof, to be holden at
5 Chicago, in the district aforesaid, on the first Monday of March next, to answer unto Mark T. Seymour, Elijah S. Alexander, Joseph O. Rutter, and Alfred J. Hopper, who sue for the use of Mark T. Seymour, Elijah S. Alexander, and Joseph O. Rutter, of a plea of covenant broken, to their damages as they allege, of five hundred thousand *thousand* dollars, and have you then and there this writ.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 17th day of February, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the 97th year.

[SEAL.] W'M H. BRADLEY, *Clk.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents that I have appointed, and by these presents do appoint, Edward F. Alexander my true and lawful deputy, to execute the annexed writ, (Mark T. Seymour et al., who sue for
6 the use of Mark T. Seymour et al. vs. The Phillips & Colby Construction Company,) and to make true return of the execution thereof according to law.

B. H. CAMPBELL, [SEAL.]
United States Marshal for the Northern District of Illinois.

I served the annexed summons upon the Phillips & Colby Construction Company, therein named, by reading the same to and in the presence and hearing of Elijah B. Phillips, the president of said company, and also delivering to him as such president, personally, a true copy thereof, on the 17th day of February, A. D. 1873.

B. H. CAMPBELL,
United States Marshal for the Northern District of Illinois.
By E. F. ALEXANDER,
Special Deputy.

Edward F. Alexander, being first duly sworn, deposes and says that he served the annexed writ, as stated in the foregoing return.

Sworn to before me this 18th day of February, A. D. 1873.

PHILIP A. HOYNE,
U. S. Com'r for Nor. Dist. Ill's.

(Endorsed:) Filed Feb'y 19th, A. D. 1873. W'm H. Bradley, clerk.

7 Afterwards, to wit, on the 21st day of February, A. D. 1873, said plaintiffs, by their attorneys, filed in said clerk's office their declaration in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Circuit court of the United States for the northern district of Illinois, of March term, A. D. 1873.

Mark T. Seymour, Elijah S. Alexander, Joseph O. Rutter, and Andrew J. Hopper, who are all citizens of the State of Illinois, and who sue for the use of Mark T. Seymour, Elijah S. Alexander, and Joseph O. Rutter, who are also citizens of the State of Illinois, by Sleeper & Whiton, their attorneys, complain of the Phillips & Colby Construction Company, a corporation duly formed and organized under the laws of the State of Wisconsin, and within the purview of the laws of the United States, a citizen of the State of Wisconsin, & which has been duly sum-

8 moned, &c., of a plea of breach of covenant.

For that whereas, heretofore, to wit, at the district aforesaid, on or about the 18th day of July, A. D. 1872, the said defendant entered into a contract in writing, sealed with its corporate seal, and bearing date on that day, with said Seymour, said Alexander, said Rutter, & said Hopper, and in the words and figures following, that is to say:

"Whereas Phillips & Colby Construction Company, as first party, entered into two certain contracts with A. J. Hopper, H. S. Boyle, and M. T. Seymour, as second party, of dates the seventh day of September, 1871, the twenty-fifth day of January, 1872, for the construction of one hundred and sixty miles of the road of the Wisconsin Central Railroad Company, and which said contracts are hereunto annexed and made a part hereof; and whereas it has been agreed between said parties that the said second party shall assign the said contracts to M. T. Seymour, E. S. Alexander, J. O. Rutter, & A. J. Hopper to become the contractors in the place and stead of the said second party, under the name and form of M. T. Seymour & Company.

9 "Now, therefore, this memorandum of agreement, made and entered into by and between Phillips Colby Construction Company, the first party, and M. T. Seymour, E. S. Alexander, J. O. Rutter, and A. J. Hopper, the party of the second part, witnesseth as follows, to wit:

"That the said first party, for and in consideration of the assignment of said contracts to said second party hereto, subject to the conditions thereof, except as hereinafter modified, and of a release by the said second party to said contracts from all claims for any extra allowance of work done thereunder, and of the covenants and agreements is said contracts on the part of the second party thereto, to be fully kept and

performed by the said second party hereto, (except as hereinafter modified and changed,) agrees:

"1st. That it will pay to the said second party, at the time of the execution on its part of this contract, the sum of fifteen thousand dollars, and the further sum of fifteen thousand dollars when the first sixty miles of said road shall be fully completed, as herein & in said contracts provided.

"2nd. That it will pay forty-five cents per surface-yard for corduroy, where clearing has been done on the line of said road up to
10 the date hereof, and forty cents per surface-yard where done on balance of the line; the first party having & reserving the right at any time to revision of the last-mentioned price by experts, one to be chosen by each of said parties and a third by the two so chosen, the decision of any two of which shall be conclusive and binding upon the parties hereto.

"3rd. That it will pay the second party for the laying of the iron on said track of road four hundred and seventy-five dollars per mile, and will supply all materials therefor at the side-track nearest thereto, the ties to be delivered at the same place, or as furnished by parties of whom they are procured, and to be distributed by the said second party; and will furnish to said second party our engine, fuel & oil therefor, one boarding-car, and the flat cars and box-cars needed for the proper prosecution of said work.

"4th. That it will pay for work hereafter done on the forty-mile section the prices named and provided in said contract of date September 7th, 1871; it being understood that the said thirty thousand dollars paid, and to be paid, as herein provided, is to be received and taken in full for extra allowances on work done, and to be done,
11 on said section of forty miles, and in full of all claims for part or future diminution of quantities.

"And that the said second party, for and in consideration of the assignments of said contracts to it, and of the sum of fifteen thousand dollars in hand paid, and of the sum of fifteen thousand dollars to be paid as herein provided, and of the covenants and agreements by the said first party in said contracts, and herein contained, covenants and agrees:

"1st. That it has taken the said assignment of said contracts, subject to the conditions, covenants, and agreements therein on the part of the second party thereto to be kept and performed, and will keep and perform the said covenants and agreements in all respects, except as the same have been modified and changed by the covenants and agreements herein contained, on the part of the parties hereto.

"2nd. That it will have the work on the said one hundred & sixty miles of road, as in said contracts and this agreement provided, completed at or within the times following, to wit: The first section of forty miles on or before the first day of September next; the third
12 section of twenty miles on or before the fifteenth day of September next; the fourth section of twenty miles on or before the fifteenth day of November next; the fifth section of twenty miles on or before the fifteenth day of December next; the sixth section of twenty miles on or before the first day of June next; the seventh section of twenty miles on or before the fifteenth day of July next; and the eighth section of twenty miles on or before the first day of October, 1873.

"3rd. That the said first party shall have the right to change the quantities of work on the whole line, or any part thereof, increasing or

diminishing the same at pleasure, the price to be paid per yard, or otherwise, as provided in said contracts, regardless of quantities, and that it hereby waives all claims for damages on account of any such changes.

"4th. That it will at all times keep and save the said first party harmless against all claims or demands which may be made upon the said first party or the said Wisconsin Central Railroad Company for the price of labor, work, materials, or supplies, performed, done, or furnished to or on account of the said second party to said contracts, and will pay all damages and costs which the said first party or the
13 said railroad company may be required to pay on any judgment or decree of any court rendered or made upon any such claims.

"And it is mutually agreed between said parties and each with the other as follows, to wit:

"1st. That when corduroys are laid, the second party shall put down the track and go directly on, leaving the cuts narrow, as may be directed by the engineer, and that said first party may take the track as laid on corduroy and raise it to grade, the object being not to allow said second party to go back and thus lose time; but that the said second party is to keep a sufficient force of men and teams on the work ahead of the track, where practicable, to raise the track on corduroy to grade by use of material from cuts.

"2nd. That the work of clearing and corduroying shall be prosecuted during the winter months as far as the same may be, in the opinion of the engineer, practicable, and that part of the work shall be completed by the 1st day of May, 1873.

"3rd. That the said sum of fifteen thousand dollars, to be paid on the completion of the first sixty miles, as herein provided, is to be
14 held by the said first party, together with the fifteen per cent. reserve on and as security for the completion of the third twenty-mile section of said road; and that the fifteen per cent. reserve on all the work beyond the first forty miles is to be left in the hands of the first party, and held by it as additional security for the performance of the contract, and to be forfeited to it and applied towards the payment of any claim for damages for failure by said second party to have the work of construction of the road completed in the time above specified.

"4th. That it is understood that the grubbing in swamps is to be diminished, and close-cutting and corduroy substituted therefor, at the discretion of the engineer, and that when done, the object will be to enable the second party to use the right of way as a wagon road, and thus to expedite the track-laying.

"5th. That the said second party shall at all times keep and maintain on said work, at the proper points on the line thereof, a force of men and teams, efficiently equipped and properly cared for, sufficient, in the opinion of the engineer of the said railroad company, to complete the work on the said several sections of said road within the time
15 limited therefor, and that in default thereof the said engineer may from time to time make his requisitions, in writing, on said second party to increase its force of men or teams, or both; and in case of failure to comply with any such requisition in whole or in part within ten days thereafter, the said first party shall be, and hereby is, authorized, and at the proper cost and charge of said second party, to supply any such deficiency in men or teams.

"6th. That the persons signing this contract, as party of the second part, shall forthwith enter into articles of copartnership with each other under the firm-name of M. T. Seymour & Co., and under such name shall hereafter be dealt with by said first party, and that the said Sey-

mour, Rutter & Alexander shall each be individually authorized to sign all papers, receipts, or acquittances in relation to said work under this agreement, and the same shall be binding upon all the members of said firm, and the same shall have the like force and effect as though the same were signed by all the members of such firm; and that at the
16 time of the execution & delivery hereof a duplicate or certified copy of such articles of copartnership shall be delivered to said first party.

"7th. That the second party shall place telegraph-poles on the entire line of its work as fast as the same is cleared, & the first party shall put up the wire and maintain line, furnish and pay an operater at or near the end of the iron, in a car to be moved from time to time as the iron is laid, and the line so operated shall be free to both parties during the construction of the road; that said operator shall be boarded by or at the cost of said second party.

"In witness whereof we have set our hands and seals this eighteenth day of July, 1872.

{ CORPORATE SEAL. } (Signed) "PHILLIPS & COLBY CON. CO.,
"By E. B. PHILLIPS, JR.
"M. T. SEYMOUR.
"E. S. ALEXANDER.
"JOSEPH A. RUTTER.
"A. J. HOPPER."

17 And the plaintiffs further aver that the contract referred to in the first clause of the foregoing agreement as having been entered into by the said defendant with A. T. Hopper, H. S. Boyle, and M. T. Seymour, and bearing date September 7th, A. D. 1871, was in the words and figures following, that is to say:

"This article of agreement, made this seventh day of September, one thousand eight hundred and seventy-one, by and between the Phillips & Colby Construction Co., contractors for building the Wisconsin Central Railroad, party of the first part, and A. T. Hopper, H. S. Boyle, and M. T. Seymour, of Chicago, Ill., party of the second part, witnesseth: That the second party, for and in consideration of covenants and stipulations and agreements of said party of the first, as hereinafter mentioned, promises and agrees to execute, construct, and finish in every respect in the most substantial and workmanlike manner, and to the satisfaction and acceptance of the cheif or assistant engineers of the Wisconsin Central Railroad Company, or the said party of the first part, all the work required on that part of the Wisconsin Central Railroad commencing on what is known as "middle division," (beginning
17 at Wisconsin River, at Stevens' Point, and running west,) at the west end of work now being done by John Storthower, about stat. 35, and extending to and including sect. 40 of said middle division, as shown by the profile of said work. The said party of the second *of the second* part agrees to commence said work in ten days from the date of this instrument, and to prosecute the same with such force and means as will in the opinion of said cheif or assistant engineers ensure the completion of the same, as follows: The 1st ten (10) sections to be completed on or before the 15th day of October, 1871; the 2nd ten (10) sections before the 25th of October, 1871; the 3rd ten (10) sections before the 5th of November, 1871, and the remainder before the end of November, 1871; to be subject at all times during the progress of said work to the directions of said cheif or assistant engineers, or parties of the first part, as to the mode of doing the same, and to conform to the

rules and general specifications hereunto attached and made a part of this agreement.

"Said second party, for the consideration aforesaid, also hereby agrees not to assign or transfer this contract or relet any of said work without the written assent of said first party, but shall
19 constantly superintend said work in person. Said second party also agrees not to employ any man, either as overseer or laborer on said work, who shall have been dismissed from any other work for bad workmanship, intemperance, or disorderly conduct; but shall, whenever directed by said cheif or assistant engineers, dismiss any and every person who is disorderly, intemperate, quarrelsome, unfaithful, or unskillful. Said second party also hereby agrees to conform in all respects to the directions and instructions of said cheif or assistant engineers, or parties of the first party, relative to said work, and shall progress with the same at such time or times, in such manner, and at such particular points on the line of said work, as said cheif or assistant engineers shall direct.

"It is mutually agreed between said parties that to prevent all disputes and misunderstandings between them in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, that the said cheif engineer shall be, and is hereby, made an umpire to decide all matters arising or growing out of this contract between them.

20 "It is further mutually agreed between said parties, that if said second party shall, in the opinion of the first party, have failed or refused to comply with any of the stipulations contained in this contract to be performed by second party, said first party shall have a right to cancel this contract and declare the same void, in which event said second party shall have no claim whatever on said first party for damages, compensation, or percentage retained by said first party as hereinafter stated, either for material or work, but said first party shall have a right to take possession of and hold said material and work absolutely, and shall be absolved as entirely and completely from this contract as if the same had never been made. It is further mutually agreed and understood, that if said second party shall at any time neglect or refuse to progress with the work as fast as in the opinion of the engineer or party of the first part (communicated in writing to said second party) may be necessary for the completion by the time specified herein, then said first party may declare this contract abandoned, and the amount which shall have been retained at the time out of the monthly estimates, which would have become due at the completion of this
21 contract, shall be forfeited to said first party, or said first party may at their option employ other parties to execute any part of the work and charge the cost of the same to said second party, to be deducted out of such retained percentage, or out of any payment that shall have become due on any former estimates, or that may become due on any subsequent estimate.

"It is further mutually agreed between said parties that said first party, whenever in their opinion it may be necessary to secure to the laborers employed by said second party their wages or to parties furnishing supplies or material for the work their pay for such supplies or material, is hereby authorized to pay said laborers or parties the amount due them in the same manner said second party is to be paid, and their receipts shall be deducted from the amount which may be payable to said second party.

"It is mutually agreed between said parties that, whenever in the

opinion of the said first party it may be necessary to stop any of the work or to diminish the force employed, said first party shall have the right to do so, and the party of the second part shall have no claim for damages, but shall immediately stop the work or diminish the force, as the first party may direct.

22 "It is further mutually agreed between said parties that, whenever the quantities or value of any work to be performed under this agreement shall be materially increased or diminished by conforming to the directions of the said cheif or assistant engineers, such increase or diminution in the amount and comparative value of the work shall be determined by said cheif engineer, and the increase, if any, paid to said second party, and the diminution, if any, deducted from the amount to be paid to said party under this contract.

"It is further mutually agreed between said parties that the party of the second part shall deposit all excavations upon the road in embankments, where embankments are needed, within an extreme haul of fifteen hundred feet, according to the direction of the party of the first part, or that of the cheif or assistant engineers, and the party of the second part shall be paid in such cases for the excavation only.

"It is further mutually agreed between said parties that the party of the second part shall not be entitled to any damages occasioned by delay in the performance of work by any other contractor adjoining the work herein contracted for.

23 "It is moreover further mutually agreed between said parties that the party of the second part shall deposit all surplus excavations, not needed as embankments, in such place or places as the party of the first part or the cheif or assistant engineers may direct, within an extreme haul of fifteen hundred feet.

"It is further mutually agreed between said parties that the party of the second part shall take all borrowed earth for embankments from such place or places as the party of the first part, or the cheif or assistant engineers having charge of said road, may direct; and said material shall be measured in embankment and paid for only at embankment prices: provided that when material is hauled by direction of the cheif or assistant engineers, and for which no price is specified, said second party shall be entitled to a price in the same proportion as the work for which prices are stipulated in this contract.

"It is further mutually agreed between said parties, that if said second party shall executed any part of said work defectively, and if such imperfection shall not be of sufficient magnitude to require, in the opinion of said cheif or assistant engineers, the taking up and rebuilding of such imperfect part, the said cheif engineer shall have power, and

24 he is hereby authorized, to mak' any deduction he may think proper from the stipulated price for such work.

"It is further understood and agreed that any damage done by said second party or by the laborers in employment, or by reason of any neglect to property in the vicinity of the work under this contract while executing the same, shall be paid for by said second party; and in case there should be any unsettled claim for such damage when the final estimate is returned, said first party may retain, out of the moneys due under such final estimate, a sum equal to the amount of damages so claimed and the cost of settling the same, which sum they are to retain until said claims are determined, by legal process or otherwise, when the amount so determined, with the costs added thereto, shall be paid out of said retained moneys, and the balance, if any, returned to said second party.

"It is further agreed between the parties to this contract that any stone found in the cuts suitable for masonry on said railroad, on the work embraced in said contract, shall be hauled out of the same and deposited at such points as said party of the first part may direct, to be reserved for that purpose.

25 "It is further mutually agreed and expressly understood that the decision of said chief engineer on any point or matter touching this agreement, shall be final and conclusive between the parties hereto, and each and every of said parties hereby waives any and all right of action, suit or suits, or other remedy in law or otherwise, under this contract or arising out of the same.

"Wherever the word 'engineer' is used in this contract it is to be undersood as applying to the local or resident engineer having charge of the particular work for the time being, except in those places wherein the chief engineer is expressly mentioned.

"And the said first party, in consideration of the fulfillment and performance of all the stipulations contained in this contract by said second party, to be by said second party fulfilled and performed, and whenever said work shall have been, in the opinion of the chief engineer, completely finished in every respect, and performed agreeably to the various stipulations and specifications of this agreement, and said chief engineer shall have furnished to said first party a certificate of the fact, under his hand, together with the estimate of the quantity of the various kinds of work done by said second party under this agree-

26 ment, which estimate shall be final and conclusive between the parties hereto, will pay to said second party, within fifteen days after said certificate and estimate shall have been furnished by said chief engineer, the sum which may be due under this contract agreeably to said estimate, at the following rates and prices:

	Dollars.	Cents.
"Grubbing, per square rod	2	
"Clearing & close-cutting, per acre	35	
"Clearing outside the slope-stakes, per acre	28	
"Earth excavation, per cubic yard		30
"Embankment, per cubic yard		30
"Loose-rock excavation, per cubic yard		65
"Solid-rock excavation, per cubic yard	1	20
"Tunnel excavation, per cubic yard		
"Bridge masonry, laid in cement, per cubic yard	11	50
"Rubble masonry, laid in cement, per cubic yard	7	50
"Dressed arch-culvert masonry, laid in cement, per cubic yard.	9	00
"Rubble arch-culvert masonry, laid in cement, per cubic yard.	6	50
"Bridge masonry, laid dry or in lime-mortar, per cubic yard..	6	00
"Rubble arch-culvert masonry, laid dry or in lime-mortar, per cubic yard		
"Rubble masonry, laid dry or in lime-mortar, per cubic yard..	5	50
"Box-culvert masonry, laid dry or in lime-mortar, per cubic yard		
27 "Slope-wall, per cubic yard		
"Rips-rap, per cubic yard		
"Timber and plank in foundations, per M f't, b. m.	28	
"Timber and plank, except in foundation, per M f't b. m	35	00
"Piling, cut-off, per lineal foot		
"Piling, driven, per lineal foot		50

"Hauling stone, per mile after first two miles, per cubic yard.. 50
"Howe truss bridge, 40 to 150 f't spans, per lineal foot.....
"Ties, cut on right of way (100 f't wide) and piled convenient to loading on cars, each 20
"Ties, cut outside of right of way & delivered on line convenient to loading on cars, each 25
"Wood, cut on right of way, 2 f't long and piled convenient to loading on cars, per c'd of 128 f't 1 50

"To be paid in the following manner: Eighty-five per cent. to be paid in cash, on or about the 15th day of every month, for all work done the previous month; and it is agreed between said parties that the first party shall have the right to retain fifteen per centum of each
28 and every estimate made by said cheif engineer on the said work, till the whole has been entirely finished and completed to the satisfaction and acceptance of said cheif engineer, and he shall have furnished a certificate to that effect to said first party. It is further mutually agreed between said parties that said second party shall be paid in the manner above stated only for the actual work done and materials furnished.

"The said second party further agree to furnish at the prices above named all the ties required for main and side tracks on the above-described forty (40) sections, and to deliver them on the line of the railroad at convenient places for loading either on cars or teams, at such points as may be necessary, in order that no ties need be carried eastward when distributed for track-laying. The ties so made of any of the following-named woods: white burr or swamp oak, red elm, black or white ash, hemlock, and tammarac'. Ties to be nine (9) feet long, six (6) inches thick, and to have not less than six (6) inches face; to be inspected by the engineers when delivered as above specified, and monthly estimates made the same as for other work.

"It is further mutually agreed that the said second party shall
29 take ten thousand dollars, ($10,000,) at par, of Portage Co. (Wis.) bonds in part payment of the fifteen (15) per cent. retained from month to month, as specified in this contract. The said second party further agrees that if the amount of piling required reaches ten thousand (10,000) lineal feet, the price of the whole shall be reduced to forty cents per lineal foot, and if amount exceeds seven thousand (7,000) feet, the price of whole shall be reduced to forty-five cents per foot. It is further agreed that the said second party shall not be required to haul material across or beyond any opening in an embankment greater than one span of pile bridging.

"Ties are to be hewed from sound, straight timber.

"Wood to be sound, well manufactured, and not greater diameter than seven or less than three inches.

"GENERAL SPECIFICATIONS.—GRADING.

"1st. Under the head of excavations shall be included all excavations required for the formation of a road bed for a single track and turnouts, and for the preperation of depot-grounds, sites for water-stations, etc., which shall be required by the engineer, the digging of all ditches,
30 cutting new channels for streams, preparing foundations, the altering of all highways or private roads, and all excavations connected in any way with or incident to the construction of the railroad, and the expense of hauling and depositing the same in embankments whenever required.

"2nd. Under the head of embankment shall be included all embankments for any of the purposes mentioned in the first specification, not formed from excavations taken from the prism of the road or other necessary excavations.

"3rd. The ground set apart for the railroad must be cleared to the boundery line of the company's lands, as the same shall be designated by the engineer, and from the space required for the road-bed and its necessary slopes and side-drains and from the surface of borrowing-pits, all trees, brush, stumps, and other vegetable matter shall be cut off and grubbed up; and, together with logs, brush, wood, and fences of every discription, shall be burned or removed from the ground as the engineer may direct, so as not to injure the adjoining lands, not to the lines for the fences of said railroad, or so much of said material as is deemed suitable shall be placed in "corduroy," under the direction of the
31 engineer, whenever, in his opinion, it is thought necessary in order to sustain the adjacent embankment. When the embankments exceed two and a half feet in height it will only be required to cut the trees, stumps, and brush close to the ground; but when less than two and a half feet in height, the trees, stumps, brush, and other vegetable matter found within the slope-stakes must be grubbed up and removed beyond the limits of the embankment. Close cutting to be done so that the tops of stumps shall in no case be less than two feet below sub-grade. No allowance will be made for grubbing except where embankments are two and one-half feet or less in height, and in excavations in the prism of the road of three feet or less in depth.

"Corduroy, not included in the price for clearing, will be estimated and paid for as embankment.

"4th. All grading shall be done and estimated by the cubic yard, measured in the excavation, except material borrowed for embankment, which shall be measured in the embankment, and shall be comprised under four heads, viz: Earth, loose rock, solid rock, and tunneling. Loose rock shall include all detached masses of lime-rock or boulders measuring not less than one-half of a cubic yard, and all slate and shale in
32 places which can be removed without blasting, although blasting may be occasionally resorted to. Solid rock shall include all rock in place, and boulders measuring one cubic yard and upward, in removing which it is necessary to resort to drilling and blasting.

"Tunneling will include all material of whatsoever kind, found within the limits of the section prescribed by the engineer for the tunnels. The tunnels will be carefully cut out to the lines of the section prescribed by the engineer, and the cost of supporting the roof and sides, where timber propping is required during the progress of the work and until its completion, shall be borne by the contractor without extra compensation. For all material that may fall, or be removed in anticipation of falling from the roof and sides of the tunnel, outside of the section established by the engineer, such price shall be paid the contractor as the engineer may fix; and for all that may be left unexcavated within said deduction shall be made as he shall determine. If the roof and sides should be sufficiently solid, in the opinion of the engineer, to sustain themselves, timbering will be dispensed with. The width, height, and general figure of section tunnels, as well as the mode of supporting the roof and sides, will be varied by the engineer as the circumstances
33 of each particular case may seem to require.

"EARTH.—All other materials, of whatever nature, including boulders measuring less than one-half of a cubic yard, and loose sand, rock, slate, and shale, which can be excavated with picks, shall be considered

and estimated as earth, and under the head of excavation or embankment as the case may be.

"5th. The width of the road at the subgrade line shall be from fourteen to twenty feet in excavations, and sixteen feet in embankments, or as the engineer may direct. The slopes in the rock-cuttings shall be generally one horizontal to five perpendicular, and in earth-cuttings and embankments one and one-half horizontal to one perpendicular; but whenever deemed necessary, the slopes shall be formed in such a manner as the engineer may prescribe. The materials composing the embankments must be entirely imperishable; and wherever the natural surface upon which the em bankment is to be placed is of such a nature as in the opinion of the engineer would impare the stability or usefulness of the embankment, it shall be removed to such width and depth as the engineer may direct, and the material so removed, disposed of according to the direc-
34 tions of the engineer. Whenever the site of an embankment is covered with snow sufficiently deep to impare the utility of the work in the engineer's opinion, the same must be removed and deposited beyond the slope-stakes. Work of this nature shall always be at least one hundred feet in advance of the embankment. In all cases, whereever the engineer may deem such a course necessary, the cuttings shall be made from one and one-half to two feet below grade; and the embankment kept the same distance below grade; and whenever clean sand or gravel, or other material deemed proper for a road-bed, can be obtained within fifteen hundred feet of the place of deposit, the same shall be procured by said party of the second part, when required by the engineer, and deposited as the engineer may direct, and such work shall be estimated and paid for at the same price per cubic yard as other embankment upon the section. In case where such sand or gravel cannot be obtained within fifteen hundred feet of the place of deposit, the engineer may require the same to be hauled any specified distance, in which case the contractor will be entitled to an additional remuneration to be fixed by the engineer, it being understood that after such sand or gravel shall be placed on the road, no clay or other earth shall be
35 hauled over it. In order to allow for proper subsidence, embankments, (unless otherwise ordered by the engineer,) shall be finished to at least one-tenth of a foot additional height of the embankment; thus, an embankment five feet high shall be finished to five feet and five-tenths, and an embankment ten feet high shall *shall* be finished to the height of eleven feet, and so on.

"6th. All the excavations shall, if required, be taken or hauled into the nearest embankments an extreme distance of fifteen hundred feet, the surplus, beyond what is necessary to form the contiguous embankments, is to be disposed of in extending the embankments or along one or both sides of the same, widening them uniformly, or is to be deposited in waste banks, or otherwise, as the engineer may direct. In cases where the quantity of material taken from the regular cuttings shall not be sufficient to form the requisite embankments, the deficiency shall be supplied by taking material from the adjacent grounds at such places as the engineer may designate, or from an enlargement of the regular cutting, made equally and uniformly on one or both sides of the same, or in such manner as the engineer may direct; and the sides of the excavations in all such cases shall be dressed to such slope as the engineer may re-
quire: provided, that if the contractor shall have sloped such
35 excavation by direction of the engineer before widening the same, he shall receive for sloping the second time such compensation as the engineer may deem fair and reasonable. The filling in between

bearing-piles or foundation-timbers for masonry, or gravel or other material, shall be estimated as ordinary embankment; and in all cases where the embankment is placed over culverts, the material shall be deposited so as to cause no improper strain upon them; in such cases as well as in the filling behind abutments, the earth shall be deposited in such manner as the engineer may direct. Wherever it is required on old embankments, steps shall be cut as the engineer may direct, to prevent earth deposited thereon from sliding.

"7th. Whenever the route of the railroad is traversed by public or private roads, commodious passing-places must be kept open and in safe condition for use at the expense of the contractors; and in passing through farms the contractor must also keep up such temporary fences as will be necessary for the crops, and all damage resulting from a non-compliance with this specification will be charged to the contractor.

"8th. The line of the road or the grades may be changed if the engineer shall consider such change necessary or expedient, and for
37 any considerable alterations, the injury, if any, to the contractor will be estimated, and such allowance made in the prices as the engineer may deem just and equitable; but no claim for an increase in prices on the part of the contractor will be allowed or considered unless made in writing, before the work on that part of the section where the alteration has been made shall have been commenced. The engineer may also, on the conditions last recited, increase or diminish the length of any section for the purpose of more nearly equalizing or balancing the excavations and embankments.

"9th. Contractors, when directed by the engineer, shall deposit on the side of the road, or at such convenient points as may be designated, any stone or rock that they may excavate; and, if so doing, they shall deposit material required for embankment, the additional number of cubic yards of excavation required in forming such embankment will be allowed and paid for. All stone or rock excavated and deposited as above, together with all timber removed from the line of the road, shall be the property of the railroad company, and the contractor will be held responsible for its safe keeping until removed by said company, or until this contract is completed.

38 "10th. The roadway and works connected therewith being made of the materials and the manner above specified, the prices stipulated for excavation or embankment shall be the total price for excavating, removing, and depositing all the material, and the building of all temporary roads and bridges.

"MASONRY.

"11th. All masonry to be measured in the walls, and will be estimated and paid for by the cubic yard, and will be included under the following heads, viz: Bridge-masonry, rubble-masonry, arch-culvert masonry, rubble arch-culvert masonry, box-culvert masonry, slope-wall, and rip-rap.

"12th. All excavations for foundations of masonry shall be done by the contractor at the same price per cubic yard as other excavation of the same classification upon the section, and the price per yard for masonry shall in every case include the preparation of the foundation above and below the surface of the water; the building of coffer-dams; the bailing and pumping of all water for said foundations; the furnishing of all materials and the transportation of the same to the place where they are to be used; the cost of all scaffolding, centering,

and removing of the same, and the preparation and maintenance of all roads that may be requisite for the transportation of stone or other materials to the work.

"13th. Wherever piling or timber foundations are required, the same shall be done under the direction of the engineer, and the prices specified shall include the cost of materials and the delivery of the same, as well as the workmanship. The piles, after being driven, are to be cut off in an even manner horizontally, and the interstices filled with stone or gravel, and when required are to be capped with timber, hewed or sawed, from six to twelve inches square; which timber is to be fastened to the piles by white-oak treenails, and then planked with pine-plank, pinned or spiked to the timbers. Other timber foundations shall be composed of a frame-work of timber, hewed or sawed, from six to twelve inches square, as the engineer may direct, the same to be thoroughly and horizontally bedded and filled in with gravel, well puddled, and then, at the direction of the engineer, covered with a flooring of pine plank. Wherever paving for foundations is adopted, the same shall be composed of stone, at least twelve inches wide, set edgewise and mauled in a bed of dry sand, and to extend entirely across the
40 opening or not, at the option of the engineer.

"14th. All timber and plank in foundations except round piles, shall be measured by the one thousand feet, board measure, and the price per thousand feet, board measure, shall be understood to cover the expense of all labor and materials, spikes, pins, or treenails required in preparing the foundations as directed.

"15th. Bridge-masonry shall include abutments and piers of bridges of long spans, or stone viaducts, and side and wing walls of arch culverts of eight feet span and upward, and shall be hammer-dressed and laid either in the best hydraulic cement-mortar, or in lime-mortar, or dry, as the engineer may direct. The beds and joints of the face-stone are to be dressed back twelve inches from the face, and are to be brought to a joint not more than three-eights of an inche when laid; the faces may be rough except that the edges are to be brought to a line. The stretchers in a course, both front and rear, shall have a breadth of bed equal to at least the height of the stone, but in no case less than eighteen inches, and the headers shall have a length of at least two and one-half
41 times the height of the stone, and in no case less than three feet. One fourth of the wall in front and rear shall be occupied with headers, so arranged that the headers of one course shall fall between the headers of the course above or below, the principle stone of the backing and interior of the walls shall be large and well shaped, not less than six inches thick and two feet area of bed. When the wall is five feet or less in thickness, one third of the number of headers shall extend through the wall, and when of greater thickness than five feet, the headers shall be at least four feet long (unless the thickness of the wall is such that the stretchers in the same course on the opposite side of the wall will not admit of headers of that length.) The face-stone to be laid in courses of not less than ten inches thick. The coping-stone of abutments, piers, and bridge-seats of bridges, and the spring courses and parapet-copings of arch-masonry are to be not less than eight inches thick, and to be neatly dressed with bush-hammer on their exterior surfaces, and brought to one-fourth of an inch joints.

"16th. Rubble-masonry, comprising bridge-abutments for bridges of short spans, vertical and battered walls, retaining-walls, wing-walls
42 to bridge-abutments, side and wing walls of arched culverts of less than twelve feet span, cattle-passes, etc., shall be laid either in ce-

ment, dry, or in lime-mortar, as shall be directed. It shall be made of sound, durable, well-shaped stone, bedded at right angles with the face-batter of the wall, or horizontally as may be required, with such slopes and batter, front and rear, and of such form, as the engineer shall direct. No stone shall be used in the face that has more height than breadth of bed, and no spalls or small stones will be allowed in the face that will not bind firmly in the wall. The whole shall be well bound together with headers occupying one-fifth of the wall in front and rear, and laid so as to make good bond, and close compact work. When the wall is four feet or less in thickness, the headers shall extend through, if required. The walls when laid in mortar, shall be leveled up and coursed longitudinally at every three feet in height. All walls of rubble-masonry shall be finished with coping-stone of good shape, well joined at the ends, and not less than six inches thick and two feet wide, and not less length than once and a half the breadth.

"17th. Arch-culvert masonry shall be laid in the best hydraulic
43 cement-mortar, and shall comprise only the sheeting of arched culverts or other arched structures (the side and wing walls, piers, abutments of all arched structures of twelve span and upward being considered as bridge-masonry and of all such structures less than twelve feet span as rubble-masonry, and the backing of all arches as box-culvert masonry.) In hammer-dressed arches, the stones are to set smoothly on the centering, and the beds and joints are to be dressed, so that when laid the joints shall not be over one-fourth of an inch, and perfect through the whole thickness of the arch—the beds of the vousoirs being on a line with the radius of the arc used. Rubble-arches are to be built of large-sized and square-shaped stone, split out for the purpose, to be laid evenly and in continuous courses—the beds and end joints to extend through the whole thickness of the same. The ring-stone of all rubble-arches shall have a draft of at least one inch in width cut around the exterior face of each stone. The faces except as above required, may be left rough.

"18th. Box-culvert masonry shall include all covered and open culverts, all gothic culverts and cattle-guards, the paving under and between the walls of all culverts and bridges, and the backing of all
44 arches. Such masonry shall be built of good square-shaped stone of size and quality, and in a manner to be approved by the engineer, and shall be laid in lime-mortar when required by said engineer. Especial care must be taken that the covering-stone shall be large and well shaped, and at least twelve inches thick, and shall be at least two feet longer than the width of opening to be covered, in order to extend on to the side walls full one foot upon each side. The upper course to have at least one half of the stone headers, and the stretchers in no case to be less than twelve inches wide; no stone in this course to be less than six inches thick.

"19th. Slope wall shall be built of such quality, form, and dimensions as the engineer may require.

"20th. All stones are to be prepared by dressing and hammering before they are brought on to the walls, and are to be laid firmly on their broadest beds without the use of chips, pinners, or levelers; when laminated, their bearing-beds shall be parallel to their laminæ, no shelving projections shall be allowed to extend beyond the under bed on either side. The rear or backing face of all masonry shall be laid and bonded in a regular manner, and lined to a fair face. The stones and work are to be kept free from all dirt that will interfere with the adhesion
45 of cement or mortar to the stone. The back filling shall not be commenced on the masonry until the same is directed by the engineer.

"21st. Cement to be used either in mortar or grout shall be composed of the best quality of hydraulic lime, that has not been manufactured more than two months previous to useing, and clean, sharp sand in proportion of one part cement and two parts sand—and if sand is not obtained from natural beds or banks of sufficient purity, it shall be screened and washed until all loam, gravel, or other improper matter is removed. The hydraulic lime shall be transported from the place where it is manufactured to the place where it is to be used in tight casks, in order to prevent its injury from water or air; and no hydraulic or other lime shall be used that has been wet or in any way damaged, nor until it has been approved of by the engineer or some person under his direction. The cement shall not be mixed more than one hour before the mortar is to be used, and mortar left over night shall be removed entirely away, and not put into the work. Grout shall be used immediately after it is made. Lime-mortar shall be mixed as the engineer shall direct.

46 "In making mortar or grout, the materials shall be mixed and worked so as to thoroughly incorporate them and render the mass uniform throughout every part, and no more water shall be used than is necessary to give the proper consistency. And when mortar is exposed to dry too rapidly in the work, it shall be covered up, or have water occasionly sprinkled on it, as the engineer may direct. In laying stone in mortar, their beds are to be so prepared that, when settled down, they may rest close and full on the mortar—the joints are not to be injured after the stone has settled on its bed by lifting up one side to bring the stone level, or in line, etc., and care shall be taken in handling stone not to remove those already laid. The stone are to be laid full in their mortar beds and joints so as to render the work impervious to water, and so that the whole wall shall be one solid mass of stone and mortar.

"All masonry laid in lime-mortar or cement shall be thoroughly pointed before it can be accepted.

"22nd. All stone used on the work must be perfectly sound and durable, and of such size and dimensions as the engineer or person appointed by him may approve. It is understood that none but thoroughbred stone-masons are to be employed in laying walls of any kind.

47 "23rd. The price per yard for masonry will in all cases be understood to cover the expense of all labor and materials used in the performance of the work, including cement, when required to be used by the engineer.

"TIMBER STRUCTURES.

"24th. All timber and plank (except in foundations) in culverts, cattle-guards, trestle work, bridge-abutments, cattle-passes, and road, pile, and farm bridges, shall be of good quality and of such kinds as the engineer may direct, free from shakes, wanes, black and unsound knots, and all descriptions of decay, and shall be measured by the one thousand feet, board measure, and the price per thousand feet, board measure, shall be understood to cover the expense of all labor and materials, spikes, pins, or treenails required in the performance of the work.

"All timber structures shall be built in conformity with plans to be furnished from time to time by the engineer in charge of the work.

"25th. Piles, whether used in foundations, trestle-work, or pile bridges, shall be of good sound quality white oak, or such other timber as the chief engineer may accept, not less than ten inches in

48 diameter at the smallest end and of such lengths as the engineer

may require. They shall be measured by the lineal foot after they are driven and cut off to receive the superstructure, and the price per lineal foot shall be understood to cover the expense of driving, cutting off, removing the bark from the part above ground, making tenon on up'er end when required, and all labor and materials required in the performance of the work; but that portion of each pile cut off shall be estimated and paid for by the lineal foot, as "piles cut off." (Piles may be driven off such length and to such depth as the engineer may require.)

"26th. A more full explanation of the form and dimensions of materials and parts, and of the manner of constructing the work in all its details and plans will be furnished by the engineer, who will also give such directions from time to time, during the progress of the work, as may appear to him necessary and proper, in order to make the work complete and perfect on the plan contemplated. The above specifications and the said plans and directions shall, in every respect be complied with.

"27th. It is distinctly understood, that the quantities of work estimated are approximate, and the party of the first part reserves
49 the right of having built only such kinds and quantities, and according to such plans, as the nature or economy of the work may, in the opinion of the engineer, require.

"28th. All directions and instructions, by assistant engineers, inspectors, or other persons appointed by the party of the first part or their chief engineer, during the construction of the work covered by this contract, shall be fully and implicit'y followed and carried out.

"29th. Any omission to disapprove of the work by the engineer at the time of a monthly estimate being made, shall not be constructed to be an acceptance of any defective work.

"30th. The contractor, upon being so directed by the engineer, shall remove and rebuild or make good, without charge, any work which the latter may consider to be defectively executed.

"No charge shall be made by the contractor for hindrances or delay from any cause, in the progress of any portion of the work in this contract, but it may entitle him or them to an extension of the time allowed for completing this work sufficient to compensate for the detention, to be determined by the chief engineer, provided he or they shall give the engineer in charge immediate notice, in writing, of the
50 cause of the detention.

"Nor shall any claim be allowed for extra work, unless the same shall be done in pursuance of a written order from the engineer, at his discretion, should direct the claim, or such part of it as he may deem just and equitable, to be allowed.

"31st. Contractors shall commence their work at such points as the engineer in charge may direct, and shall conform to his directions as to the order of time in which different parts of the work shall be done, as the force required to complete the work at the time specified in the contract.

"In witness whereof the parties hereto have signed this article of agreement on the day and year first above written.

(Signed:) "PHILLIPS & COLBY CON. CO.,
"By E. B. PHILLIPS, JR.
"A. J. HOPPER.
"H. S. BOYLE.
"M. T. SEYMOUR."

51 And the plaintiffs further aver that that portion of the line of said railroad which extends from the Wisconsin River at Stevens' Point in the State of Wisconsin, westerly forty miles, was intended to be described in the last-mentioned contract as the portion of said railroad upon which the parties of the second part thereto were to do all the work required on the part of the said railroad company.

And the plaintiffs further aver that the contract referred to in the first clause of the first-above recited agreement, as having been entered into by the said defendant, with A. J. Hopper, H. S. Boyle, and M. T. Seymour, who constituted the partnership of Hopper, Boyle, & Co., and bearing date January 25th, A. D. 1872, was in the words and figures following, that is to say:

"This article of agreement, made this twenty-fifth day of January, one thousand eight hundred and seventy-two, by and between the Phillips and Colby Construction Co., contractors for building the Wisconsin Central Railroad, party of the first part, and Hopper, Boyle, &

52 Co., of Chicago, Ill., party of the second part, witnesseth: That the second party, for and in consideration of covenants, and stipulations, and agreements of said party of the first part, as hereinafter mentioned, promises and agrees to execute, construct, and finish, in every respect in the most substantial and workmanlike manner, and to the satisfaction and acceptance of the chief or assistant engineers of the Wisconsin Central Railroad Company, or the said party of the first part, all the work required on that part of the Wisconsin Central Railroad lying between the north end of sect. 40, of the middle division, and south end of sect. 1 of northern division of said railroad, as appears on the profile of said divisions of said Wisconsin Central Railroad, the same including about 120 miles of work lying between said section 40 of middle division and what is known as Penokee Gap, at the iron range. The said party of the second part agree to commence said work in thirty days from the date of this instrument, and to prosecute the same with such force and means as will, in the opinion of said chief or assistant engineers, ensure the completion of the same as follows: The first twenty (20) sections by the 15th of July, 1872;

53 the 2nd twenty (20) sections by the 15th of September, 1872; the 3rd twenty (20) sections by the 15th of November, 1872; the 4th twenty (20) sections by the 15th of January, 1873; the 5th twenty (20) sections by the 15th of July, 1873; and the remainder by the 1st of October, 1873; to be subject at all times during the progress of said work, to the directions of the said chief or assistant engineers, or parties of the first part, as to the mode of doing the same, and to conform to the rules and general specifications hereunto attached and made a part of this agreement.

"Said second party, for the consideration aforesaid also hereby agrees not to assign or tra'sfer this contract, or relet any of said work without the written assent of said first party, but shall constantly superintend said work in person.

"Said second party also agrees not to employ any man either as overseer or laborer on said work who shall have been dismissed from any other work for bad workmanship, intemperance, or disorderly conduct, but shall, whenever directed by said chief or assistant engineers, dismiss any and every person who is disorderly, intemperate, quarrelsome, unfaithful or unskillful.

54 "Said second party also hereby agrees to conform in all respects to the directions and instructions of said chief or assistant engineers, or parties of the first part relative to said work, and shall

progress with the same at such time or times, in such manner, and at such particular points on the line of said work as said chief or assistant engineers shall direct. It is mutually agreed between said parties that, to prevent all disputes and misunderstandings between them in relation to any of the stipulations contained in this agreement, or their performance by either of said parties, that the said chief engineer shall be and is hereby made an umpire to decide all matters arising or growing out of this contract between them.

"It is further mutually agreed between said parties that if said second party shall, in the opinion of the first party, have failed or refused to comply with any of the stipulations contained in this contract to be performed by said second party, said first party shall have a right to cancel this contract and declare the same void, in which event said second party shall have no claim whatever on said first party for damages, compensation, or percentage retained by said first party
55 as hereinafter stated, either for material or work, but said first party shall have a right to take possession of and hold said material and work absolutely, and shall be absolved as entirely and completely from this contract as if the same had never been made. It is further mutually agreed and understood that if the said second party shall at any time neglect or refuse to progress with the work as fast as in the opinion of the engineer or party of the first part (communicated in writing to said second party) may be necessary for the completion by the time specified herein, then said first party may declare this contract abandoned, and the amount which shall have been retained at the time out of the monthly estimates which would have become due at the completion of this contract, shall be forfeited to said first party; or said first party may, at their option, employ other parties to execute any part of the work and charge the cost of the same to said second party, to be deducted out of such retained percentage, or out of any payment that shall have become due on any former estimates, or that may become due on any subsequent estimate.

"It is further mutually agreed between said parties that said
56 first party, whenever in their opinion it may be necessary to secure to the laborers employed by said second party their wages, or to parties furnishing supplies or material for the work, their pay for such supplies or material, is hereby authorized to pay said laborers or parties the amount due them in the same manner said second party is to be paid, and their receipts shall be deducted from the amount which may be payable to said second party.

"It is mutually agreed between said parties that whenever, in the opinion of the said first party it may be necessary to stop any or all of the work, or to diminish the force employed, said first party shall have the right to do so, and the party of the second part shall have no claim for damages, but shall immediately stop the work or diminish the force as the first party may direct.

"It is further mutually agreed between said parties that, whenever the quantities or value of any work to be performed under this agreement shall be materially increased or diminished by conforming to the directions of the said chief or assistant engineers, such increase or diminution in the amount and comparative value of the work
57 shall be determined by said chief engineer, and the increase, if any, paid to said second party, and the diminution, if any, deducted from the amount to be paid to said party under this contract. It is further mutually agreed between said parties that the party of the second part shall deposit all excavations upon the road in embank

ments where embankments are needed, within an extreme haul of fifteen hundred feet, according to the direction of the party of the first part, or that of the chief or assistant engineers, and the party of the second part shall be paid in such cases for the excavation only.

"It is further mutually agreed between said parties that the party of the second part shall not be entitled to any damages occasioned by delay in the performance of work by any other contractor adjoining the work herein contracted for.

"It is moreover further mutually agreed between said parties that the party of the second part shall deposit all surplus excavations not needed as embankments in such place or places as the party of the first part or the chief or assistant engineers may direct, within an extreme haul of fifteen hundred feet.

58 "It is further mutually agreed between said parties that the party of the second part shall take all borrowed earth for embankments from such place or places as the party of the first part, or the chief or assistant engineers having charge of said road may direct; and said material shall be measured in embankment and paid for only at embankment prices, provided that when material is hauled by direction of the chief or assistant engineers, and for which no price is specified, said second party shall be entitled to a price in the same proportion as the work for which prices are stipulated in this contract.

"It is further mutually agreed between said parties that if said second party shall executed any part of said work defectively, and if such imperfection shall not be of sufficient magnitude to require, in the opinion of said chief or assistant engineers, the taking up and rebuilding of such imperfect part, the said chief engineer shall have power, and he is hereby authorized, to make any deduction he may think proper from the stipulated price for such work.

"It is further understood and agreed that any damage done by said second party, or by the laborers in their employment, or by

59 reason of any neglect, to property in the vicinity of the work under this contract, while executing the same, shall be paid for by said second party, and in case there should be any unsettled claim for such damage when the final estimate is returned, said first party may retain out of the moneys due under such final estimate, a sum equal to the amount of damages so claimed, and the cost of settling the same; which sum they are to retain until said claims are determined by legal process, or otherwise, when the amount so determined, with the costs added thereto, shall be paid out of said retained moneys, and the balance, if any, returned to said second party.

"It is further agreed between the parties to this contract that any stone found in the cuts suitable for masonry on said railroad on the work embraced in said contract, shall be hauled out of the same and deposited at such points as said party of the first part may direct, to be reserved for that purpose.

"It is further mutually agreed and expressly understood that the decision of said chief engineer on any point or matter touching this agreement shall be final and conclusive between the parties

60 hereto, and each and every of said parties hereby waives any and all right of action, suit or suits, or other remedy, in law or otherwise, under this contract, or arising out of the same.

"Wherever the word 'engineer' is used in this contract it is to be understood as applying to the local or resident engineer having charge of the particular work for the time being, except in those places wherein the chief engineer is expressly mentioned. And the said first party, in

consideration of the fulfillment and performance of all the stipulation' contained in this contract, by said second party, to be by said second party fulfilled and performed, and whenever said work shall have been, in the opinion of the chief engineer, completely finished in every respects, and performed agreeably to the various stipulations and specifications of this agreement, and said chief engineer shall have furnished to said first party a certificate of the fact, under his hand, together with his estimate of the quantity of the various kinds of work done by said second party under this agreement, which estimate shall be final and conclusive between the parties hereto, will pay to said second party within
61 thirty days after said certificate and estimate shall have been furnished by said chief engineer, the sum which may be due under this contract agreeably to said estimate, at the following rates and prices:

	Dollars.	Cents.
"Grubbing, per square rod	2	12½
"Clearing and close cutting, per acre	38	
"Clearing outside the slope-stakes, per acre	35	
"Earth excavation, per cubic yard		40
"Embankment, per cubic yard		40
"Loose-rock excavation, per cubic yard		85
"Solid-rock excavation, per cubic yard	1	50
"Tunnel excavation, per cubic yard		
"Bridge-masonry, laid in cement, per cubic yard	22	
"Rubble-masonry, laid in cement, per cubic yard	9	
"Dressed arch-culvert masonry, laid in cement, per cubic yard,	10	50
"Rubble arch-culvert masonry, laid in cement, per cubic yard.	10	50
"Ties cut on 100-f't right of way and piled convenient for loading on cars		25
"Box-culvert masonry, laid dry or in lime-mortar, per cubic yard	7	50
"Slope wall, per cubic yard	6	
"Riprap, per cubic yard	5	
"Timber and plank in foundations, per M f't, b. m	35	
62 "Timber and plank, except in foundations, per M f't, b. m	44	75
"Piling cut off, per lineal foot }		50
"Piling driven, per lineal foot }		
"Hauling stone per mile, after first two miles, per cubic yard.	1	50
"Howe truss-bridge, 40 to 150 f't spans, per lineal f't		
"Hard-body wood, 2 f't long, (128 f't to the cord,) cut on 100 f't right of way, piled, per cord	2	
"Logs cut and skidded at such places and in such manner that they may be conveniently loaded on cars, per thousand f't, b. m.	2	50

"To be paid in the following manner: eighty-five per cent. to be paid in cash, on or about the 15th day of every month for all work done the previous month, and it is agreed between said parties that the first party shall have the right to retain fifteen per centum of each and every estimate made by said chief engineer on the said work till the whole has been entirely finished and completed to the satisfaction and acceptance of said chief engineer, and he shall have furnished a certificate to that effect to said first party. It is further mutually agreed between
63 said parties that said second party shall be paid in the manner above stated, only for the actual work done and materials furnished.

It is further agreed that the within-described divisions of twenty sections each shall be understood to commence at and number from the 40th sect. of middle division before referred to towards the Iron Range, but nothing herein shall prohibit the said second party from commencing work at any time at any other points on said work.

"It is further agreed that, in addition to pine all suitable white-oak and white-ash, bass-wood and butternut woods shall be cut into logs of the lengths of 12, 16, 18, 20, 24, & 30 ft., or such other lengths not less than 12 ft., as the engineer may direct.

"It is further agreed that the said second party shall take, in part payment of the fifteen per cent. reserved, ten thousand dollars ($10,000) in Portage Co. (Wis.) bonds at ninety (90) per cent. of their nominal par value for each sixty (60) sections of fractions thereof, constructed and finished under this contract; that is to say, ten thousand dollars ($10,000) in said bonds, when sixty consecutive sections, commencing at the said 40th section of middle division are finished, and ten thou-
64 sand dollars ($10,000) in said bonds when the remainder of the work described in this contract is finished.

"It is further agreed that, whenever and as fast as twenty consecutive sections of the work are finished, as herein agreed, full payment shall be made for the same in the manner hereinbefore provided, said second party taking such proportion of Portage Co. bonds as can be conveniently delivered by said first party. It is further agreed that this contract may be terminated by said first party, upon giving thirty days' days notice of such intention, and in such case the hay, grain, and provisions of said second party on the work, at the time of giving such notice, shall be taken at cost by the said first party.

"It is further agreed that the second party shall pay ten dollars ($10) per car-load for supplies required for the within-described work, and carried over the Wisconsin Central R. R., and for every fraction of a load so carried shall pay one dollar and fifty cents per ton. Also that men engaged as laborers on said work shall be carried free over said railroad when going on to the work.

"It is further agreed that, in consideration of the foregoing agreement, if the work between Stevens' Point and Portage City is let
65 the present season it shall be awarded to the said second party, at twenty-five and one-half cents (25½) per yard for earth-work, and that for the masonry, bridging, and other work required the price shall be fixed by the chief engineer of the said party of the first part. Also, that in part payment of the fifteen per cent., when due, said second party shall take ten thousand dollars ($10,000) in Portage Co. bonds at ninety (90) per cent. of their nominal value.

"GENERAL SPECIFICATIONS.—GRADING.

"1st. Under the head of excavations shall be included all excavations required for the formation of a road-bed for a single track and turn-outs, and for the preperation of depot-grounds, sites for water-stations, etc., which shall be required by the engineer, the digging of all ditches, cutting new channels for streams, preparing foundations, the altering of all highways or private roads, and all excavations in any way connected with or incident to the construction of the railroad, and the expense of hauling and depositing the same in embankments wherever required.

"2nd. Under the head of embankment shall be included all em-
66 bankment for any of the purposes mentioned in the first specification not formed from excavations taken from the prism of the road or other necessary excavations.

"3rd. The ground set apart for the railroad must be cleared to the boundary line of the company's lands, as the same shall be designated by the engineer, and from the space required for the road-bed and its necessary slopes and side drains, and from the surface of borrowing pits all trees, brush, stumps, and other vegetable matter shall be cut off or grubbed up; and, together with logs, brush, wood, and fences of every description, shall be burned or removed from the ground as the engineer may direct, so as not to injure the adjoining lands nor to obstruct the lines for the fences of said railroad or so much of said material as is deemed suitable shall be placed in "corduroy," under the direction of the engineer, whenever, in his opinion, it is thought necessary in order to sustain the adjacent embankment. When the embankment exceeds two-and-a-half feet in height it will only be required to cut the trees, stumps, and brush close to the ground; but when less than two-and-a-half feet in height, the trees, stumps, brush, and other vegetabl' matter found within the
67 slope-stakes must be grubbed up and removed beyond the limits of the embankment. Close cutting to be done so that the tops of stumps shall in no case be less than two feet below subgrade. No allowance will be made for grubbing, except where embankments are two-and-one-half feet or less in height, and in excavations in the prism of the road of three feet or less in depth.

"Corduroy, not included in the price for clearing, will be estimated and paid for as embankment.

"4th. All grading shall be done and estimated by the cubic yard, measured in the excavation, except material borrowed for embankment, which shall be measured in the embankment, and shall be comprised under four heads, viz: Earth, loose rock, solid rock, and tunneling.

"Loose rock shall include all detached masses of lime-rock or boulders measuring not less than one-half of a cubic yard, and all slate and shale in places which can be removed without blasting, although may be occasionally resorted to. Solid rock shall include all rock in place, and boulders measuring one cubic yard and upward, in removing which it is necessary to resort to drilling and blasting.

"Tunneling will include all material of whatsoever kind found within the limits of the section prescribed by the engineers for the tunnels.
68 The tunnels will be carefully cut out to the lines of the section prescribed by the engineer, and the cost of supporting the roofs and sides, where timber propping is required during the progress of the work and until its completion, shall be borne by the contractor without extra compensation. For all material that may fall, or be removed in anticipation of falling from the roof and sides of the tunnels, outside of the section established by the engineer, such price shall be paid the contractor as the engineer may fix; and for all that may be left unexcavated within said deduction shall be made as he shall determine. If the roof and sides should be sufficiently solid, in the opinion of the engineer, to sustain themselves, timbering will be dispensed with. The width, height, and general figure of section-tunnels as well as the modes of supporting the roof and sides will be varied by the engineer as the circumstances of each particular case may seem to require.

"EARTH.—All other materials of whatever nature, including boulders, measuring less than one-half of a cubic yard, and loose-sand, rock, slate, and shale, which can be excavated with picks, shall be considered and estimated as earth, and under the head of excavation or embankment, as the case may be.

"5th. The width of the road at the subgrade line shall be from
69 fourteen to twenty feet in excavations, and sixteen feet in em-

bankments, or as the engineer may direct. The slopes in the rock-cuttings shall be generally one horizontal to five perpendicular, and in earth-cuttings and embankments one and one-half horizontal to one perpendicular; but, whenever deemed necessary, the slopes shall be formed in such a manner as the engineer may prescribe. The materials composing the embankments must be entirely imperishable, and whenever the natural surface upon which the embankment is to be placed, is of such a nature as, in the opinion of the engineer, would impair the stability or usefulness of the embankment, it shall be removed to such width and depth as the engineer may direct, and the material so removed, disposed of according to the directions of the enginner. Whenever the site of an embankment is covered with snow sufficiently deep to impair the utility of the work, in the engineer's opinion, the same must be removed and deposited beyond the slope-stakes. Work of this nature shall always be at least one hundred feet in advance of the embankment. In all cases wherever the engineer may deem such a course necessary, the cuttings shall be made from one and one-half to two feet
70 below grade, and the embankment kept the same distance below grade; and whenever clean sand or gravel, or other material deemed proper for a road-bed, can be obtained within fifteen hundred feet of the place of deposit, the same shall be procured by said party of the second part, when required by the engineer, and deposited as the engineer may direct, and such work shall be estimated and paid for at the same price per cubic yard as other embankment upon the section. In case where such sand or gravel cannot be obtained within fifteen hundred feet of the place of deposit, the engineer may require the same to be hauled any specified distance, in which case the contractor will be entitled to an additional remuneration, to be fixed by the engineer, it being understood that after such sand or gravel shall be placed on the road, no clay or other earth shall be hauled over it. In order to allow for proper subsidence, embankments (unless otherwise ordered by the engineer) shall be finished to at least one-tenth of a foot additional height of the embankment; thus, an embankment five feet high, shall be finished to five feet and five-tenths, and an embankment ten feet high shall be finished to the height of eleven feet; and so on.

71 "6th. All the excavations shall, if required, be taken or hauled into *to* the nearest embankments, an extreme distance of fifteen hundred feet; the surplus beyond what is necessary to form the contiguous embankments is to be disposed of in extending the embankments, or along one or both sides of the same, widening them uniformly, or is to be deposited in waste banks, or otherwise, as the engineer may direct. In cases where the quantity of material taken from the regular cuttings shall not be sufficient to form the requisite embankments, the deficiency shall be supplied by taking material from the adjacent grounds, at such places as the engineer may designate, or from an enlargement of the regular cutting, made equally and uniformly on one or both sides of the same, or in such manner as the engineer may direct, and the sides of the excavations in all such cases shall be dressed to such slope as the engineer may require; provided that if the contractor shall have sloped such excavation, by direction of the engineer, before widening the same, he shall receive for sloping the second time, such compensation as the engineer may deem fair and reasonable. The filling in between bearing-piles or foundation-timbers for masonry, or gravel, or other material, shall be estimated as ordinary embank-
72 ment; and in all cases where the embankment is placed over culverts the material shall be deposited so as to cause no improper

strain upon them. In such cases as well as in the filling behind abutments, the earth shall be deposited in such manner as the engineer may direct. Wherever it is required on old embankments, steps shall be cut as the engineer may direct, to prevent earth deposited thereon from sliding.

"7th. Whenever the route of the railroad is traversed by public or private roads, commodious passing-places must be kept open and in safe condition for use, at the expense of the contractors; and in passing through farms the contractors must also keep up such temporary fences as will be necessary for the crops, and all damage resulting from a non-compliance with this specification will be charged to the contractor.

"8th. The line of the road or the grades may be changed, if the engineer shall consider such change necessary or expedient, and for any considerable alterations the injury, if any, to the contractor will be estimated, and such allowance made in the prices as the engineer may deem just and equitable; but no claim for an increase in prices on the part of the contractor will be allowed or considered, unless made in writing
73 before the work on that part of the section where the alteration has been made shall have been commenced. The engineer may also, on the conditions last recited, increase or diminish the length of any section for the purpose of more nearly equalizing or balancing the excavations and embankments.

"9th. Contractors, when directed by the engineer, shall deposit on the side of the road, or at such convenient points as may be designated, any stone or rock that they may excavate, and if so doing they shall deposit material required for embankment, the additional number of cubic yards of excavation required in forming such embankment will be allowed and paid for. All stone or rock excavated and deposited as above, together with all timber removed from the line of the road shall be the property of the railroad company, and the contractor will be held responsible for its safe keeping until removed by said company or until this contract is completed.

"10th. The roadway and works connected therewith being made of the materials and the manner above specified, the prices stipulated for excavation or embankment shall be the total price for excavating, removing, and depositing all the material, and the building of all temporary roads and bridges.

74 "MASONRY.

"11th. All masonry to be measured in the walls and will be estimated and paid for by the cubic yard, and will be included under the following heads, viz: bridge-masonry, rubble-masonry, arch-culvert masonry, rubble arch-culvert masonry, box-culvert masonry, slope-wall, and riprap.

"12th. All excavations for foundations of masonry shall be done by the contractor at the same price per cubic yard as other excavation of the same classification upon the section, and the price per yard for masonry shall in every case include the preparation of the foundations above and below the surface of the water, the building of coffer-dams, the bailing and pumping of all water for said foundations, the furnishing of all materials and the transportation of the same to the place where they are to be used, the cost of all scaffolding, centering, and removal of the same, and the preparation and maintenance of all roads that may be requisite for the transportation of stone and other materials to the work.

"13th. Wherever piling or timber foundations are required, the same

shall be done under the direction of the engineer, and the prices specified shall include the cost of materials and the delivery of the
75 same, as well as the workmanship. The piles after being driven are to be cut off in an even manner horizontally, and the interstices filled with stone or gravel, and when required are to be capped with timber hewed or sawed from six to twelve inches square, which timber is to be fastened to the piles by white-oak treenails, and then planked with pine plank pinned or spiked to the timbers. Other timber-foundations shall be composed of a frame-work of timber hewed or sawed from six to twelve inches square, as the engineer may direct, the same to be thoroughly and horizontally bedded and filled in with gravel, well puddled, and then at the direction of the engineer, covered with a flooring of pine plank. Wherever paying for foundations is adopted the same shall be composed of stone at least twelve inches wide, set edgewise, and mauled in a bed of dry sand, and to extend entirely across the opening or not, at the option of the engineer.

"14th. All timber and plank in foundations except round piles, shall be measured by the one-thousand feet, board measure, and the price per thousand feet, board measure, shall be understood to cover the expense of all labor and materials, spikes, pins, or treenails, required in preparing the foundations as directed.

76 "15th. Bridge-masonry shall include abutments and piers of bridges of long spans, or stone viaducts, and side and wing walls of arch-culverts of eight-feet span and upward, and shall be hammer-dressed and laid either in the best hydraulic cement-mortar or in lime-mortar or dry, as the engineer may direct. The beds and joints of the face-stone are to be dressed back twelve inches from the face, and are to be brought to a joint of not more than three-eighths of an inch when laid; the faces may be rough except that the edges are to be brought to a line. The stretchers in a course, both front and rear, shall have a breadth of bed equal to at least the height of the stone, but in no case less than eighteen inches; and the headers shall have a length of at least two and a half times the height of the stone, and in no case less than three feet. One-fourth of the wall in front and rear shall be occupied with headers, so arranged that the headers of one course shall fall between the headers of the course above or below. The principle stone of the backing and interior of the walls shall be large and well shaped, not less than six inches thick and two feet area of bed. When the wall is five feet or less in thickness, one-third of the number of headers shall extend
77 through the wall, and when of greater thickness than five feet, the headers shall be at least four feet long, (unless the thickness of the wall is such that the stretchers in the same course on the opposite side of the wall will not admit of headers of that length.) The face-stone to be laid in courses of not less than ten inches thick. The coping-stone of abutments, piers, and bridge-seats of bridges, and the spring courses and parapet-copings of arch-masonry are to be not less than eight inches thick, and to be neatly dressed with bush-hammer on their exterior surfaces, and brought to one-fourth of an inch joints.

"16th. Rubble-masonry, comprising bridge-abutments for bridges of short spans, vertical and battered walls, retaining-walls, wing-walls to bridge-abutments, side and wing-walls of arched culverts of less than twelve-feet span, cattle-passes, etc., shall be laid either in cement, dry, or in lime-mortar, as shall be directed. It shall be made of sound, durable, well-shaped stone, bedded at right angles with the face-batter of the wall, or horizontally, as may be required, with such slopes and batter, front and rear, and of such form as the engineer may direct.

78 No stone shall be used in the face that has more height than breadth of bed, and no spalls or small stones will be allowed in the face that will not bind firmly in the wall. The whole shall be well bound together with headers occupying one-fifth of the wall, in front and rear, and laid so as to make good bond, and close, compact work. When the wall is four feet or less in thickness, the headers shall extend through if required. The walls, when laid in mortar, shall be leveled up and coursed longitudinally at every three feet in height. All walls of rubble-masonry shall be finished with coping-stone of good shape, well joined at the ends, and not less than six inches thick and two feet wide, and not less length than once and one-half the breadth.

"17. Arch-culvert masonry shall be laid in the best hydraulic-cement mortar, and shall comprise only the sheeting of arched culverts or other arched structures, (the side and wing walls, piers, and abutments of all arched structures of twelve-feet span and upward being considered as bridge-masonry, and of all such structures less than twelve-feet span as rubble-masonry, and the backing of all arches as box-culvert masonry.)

79 In hammer-dressed arches, the stones are to .set smoothly on the centering, and the beds and joints are to be dressed, so that when laid the joints shall not be over one-fourth of an inch, and perfect through the whole thickness of the arch, the beds of the vous'oirs being on a line with the radius of the arc used. Rubble-arches are to be built of large-sized, square-shaped stone, split out for the purpose, to be laid evenly and in continuous courses, the beds and end joints to extend through the whole thickness of the same. The ring-stone of all rubble-arches shall have a draft of at least one inch in width cut round the exterior face of each stone. The faces, except as above required, may be left rough.

"18th. Box-culvert masonry shall include all covered and open culverts, all gothic culverts and cattle-guards, the paving under and between the walls of all culverts and bridges, and the backing of all arches. Such masonry shall be built of good square-shaped stone, of size and quality, and in a manner, to be approved by the engineer, and shall be laid in lime-mortar when required by said engineer. Especial care must be taken that the covering-stone shall be large and well-shaped, and at

80 least twelve inches thick, and shall be at least two feet longer than the width of opening to be covered, in order to extend on to the side walls full one foot upon each side; the upper course to have at least one-half of the stone headers, and the stretchers in no case to be less than twelve inches wide; no stone in this course to be less than six inches thick.

"19th. Slope-wall shall be built of such quality, form, and dimensions as the engineer may require.

"20th. All stones are to be prepared by dressing and hammering before they are brought on to the walls, and are to be laid firmly on their broadest beds without the use of chips, pinners, or levelers. When laminated, their bearing-beds shall be parallel to their laminæ. No shelving projections shall be allowed to extend beyond the under bed on either side. The rear or backing face of all masonry shall be laid and bonded in a regular manner, and lined to a fair face. The stone and work are to be kept free from all dirt that will interfere with the adhesion of cement or mortar to the stone. The back filling shall not be commenced on the masonry until the same is directed by the engineer.

"21st. Cement to be used either in mortar or grout shall be composed of the best quality of hydraulic lime, that has not been manufactured

more than two month' previous to using, and clean, sharp sand,
81 in proportion of one part cement and two parts sand; and if sand is not obtained from natural beds or banks of sufficient purity, it shall be screened and washed until all loam, gravel, and other improper matter is removed. The hydraulic lime shall be tra'sported from the place where it is manufactured to the place where it is to be used in tight casks, in order to prevent its injury from water or air; and no hydraulic or other lime shall be used that has been wet or in any way damaged, nor until it has been approved of by the engineer or some person under his direction. The cement shall not be mixed more than one hour before the mortar is to be used, and mortar left over night shall be removed entirely away, and not put into the work. Grout shall be used immediately after it is made. Lime mortar shall be mixed as the engineer shall direct.

"In making mortar or grout the materials shall be mixed and worked so as to thoroughly incorporate them and render the mass uniform throughout every part, and no more water shall be used than is necessary to give the proper consistency. And when mortar is exposed to dry too rapidly in the work it shall be covered up or have water occasion'ly sprinkled on it, as the engineer may direct. In laying
82 stone in mortar their beds are to be so prepared that when settled down they may rest close and full on the morter. The joints are not to be injured after the stone has settled on its bed, by lifting up one side to bring the stone level, or in line, etc., and care shall be taken in handling stone, not to remove those already laid. The stone are to be laid full in their mortar beds and joints so as to render the work impervious to water, and so that the whole wall shall be one solid mass of stone and mortar.

"All masonry laid in lime-mortar or cement shall be thoroughly pointed before it can be accepted.

"22d. All stone used on the work must be perfectly sound and durable, and of such size and dimensions as the engineer, or person appointed by him, may approve. It is understood that none but thorough-bred stone-masons are to be employed in laying walls of any kind.

"23rd. The price per yard for masonry will in all cases be understood to cover the expense of all labor and materials used in the performance of the work, including cement, when required to be used by the engineer.

"TIMBER STRUCTURES.

"24th. All timber and plank (except in foundations) in culverts,
83 cattle-guards, trestle-work, bridge-abutments, cattle-passes, and road, pile, and farm bridges, shall be of good quality and of such kinds as the engineer may direct, free from shakes, wanes, black and unsound knots, and all discriptions of decay, and shall be measured by the one thousand feet, board measure, and the price per thousand feet, board measure, shall be understood to cover the expenses of all labor and materials, spikes, pins, or treenails required in the performance of the work. All timber structures shall be built in conformity with plans to be furnished from time to time by the engineer in charge of the work.

"25th. Piles, whether used in foundations, trestle-work, or pile-bridges, shall be of good sound quality white-oak, or such other timber as the chief engineer may accept, not less than ten inches in diameter at the smallest end, and of such lengths as the engineer may require. They shall be measured by the lineal foot after they are driven and cut

off to receive the superstructure, and the price per lineal foot shall be understood to cover the expense of driving, cutting off, removing the bark from the part above ground, making tenon on upper end
84 when required, and all labor and materials required in the performance of the work ; but that portion of each pile cut off shall be estimated and paid for by the lineal foot as "piles cut off." (Piles shall be driven of such length and to such depth as the engineer may require.)

"26th. A more full explanation of the form and dimensions of materials and parts and of the manner of constructing the work in all its details and plans will be furnished by the engineer, who will also give such directions from time to time during the progress of the work as may appear to him necessary and proper, in order to make the work complete and perfect on the plan contemplated. The above specifications and the said plans and directions shall in every respect be complied with.

"27th. It is distinctly understood that the quantities of work estimated are approximate, and the party of the first part reserves the right of having built only such kinds and quantities, and according to such plans as the nature or economy of the work may, in the opinion of the engineer, require.

85 "28th. All directions and instructions given by assistant engineers, inspectors, or other persons appointed by the party of the first part, or their chief engineer, during the construction of the work covered by this contract shall be fully and implic'tly followed and carried out.

"29th. Any omission to disapprove of the work by the engineer, at the time of a monthly or other estimate being made, shall not be constructed to be an acceptance of any defective work.

"30th. The contractor upon being so directed by the engineer, shall remove and rebuild, or make good without charge any work which the latter may consider to be defectively executed.

"No charge shall be made by the contractor for hindrances or delay from any cause in the progress of any portion of the work in this contract, but it may entitle him or them to an extension of the time allowed for completing this work sufficient to compensate for the detention, to be determined by the chief engineer, provided he or they shall give the engineer in charge immediate notice in writing of the cause of the detention.

86 "Nor shall any claim be allowed for extra work, unless the same shall be done in pursuance of a written order from the engineer, at his discretion, should direct the claim, or such part of it as he may deem just and equitable to be allowed.

"31st. Contractors shall commence their work at such points as the engineer in charge may direct; and shall conform to his directions as to the order of time in which different parts of the work shall be done, as the force required to complete the work at the time specified in the contract.

"In witness whereof the parties hereto have signed this article of agreement on the day and year first above written.

(Signed) "PHILLIPS & COLBY CON. CO.
"By E. B. PHILLIPS, JR.
"HOPPER, BOYLE & CO."

87 And the plaintiffs also further aver that that portion of the line of said railroad which extends one hundred and twenty miles, or

thereabouts, northwesterly from the westerly end of that portion of said railroad upon which work was to be done under the said contract bearing date September 7th, A. D. 1871, by the parties of the second part thereto, was intended to be described in the last above-mentioned contract as the portion of said railroad upon which the parties of the second part thereto were to do all the work required on the part of said railroad company.

And the plaintiffs also aver that said Hopper, before the commencement of this suit, duly assigned his interest in the monies recoverable upon all the said contracts to said Seymour, said Alexander, and said Rutter.

And the plaintiffs further aver that upon the execution of the first above-recited agreement, bearing date July 18th, A. D. 1872, they became sub-contractors under the said defendant for the building of the 160 miles, or thereabouts, of railroad mentioned to be built for the
88 defendant in the said agreements bearing date September 7th, A. D. 1871, and January 25th, A. D. 1872, subject to the conditions and upon the considerations set forth in the said three agreements. And upon the execution of the said agreement, signed by them as aforesaid, the plaintiffs, to wit, on the 18th day of July, 1872, at Stevens' Point aforesaid, entered vigorously upon the work of completing such 160 miles of railroad in accordance with their aforesaid agreements; and to that end made a very heavy expenditure, to wit, the sum of fifty thousand dollars, in procuring men, teams, tools, supplies, and all the various implements and equipments necessary for carrying on said work.

And the plaintiffs also aver that with the approval of the said defendant they afterwards, to wit, in the month of August, A. D. 1872, entered into contracts with divers parties for constructing the westerly 100 miles of that part of said railroad referred to in said agreement bearing date January 25, A. D. 1872, and in the manner therein provided, but at a much smaller cost than was therein agreed to be paid for such work, so that such contracts would have afforded to these plaint-
89 iffs a large profit, to wit, the sum of two hundred thousand dollars, had not the default of the defendant, as herein set forth, prevented them from realizing the same.

And the plaintiffs further aver that in constructing the first sixty miles of said railroad extending west from Stevens' Point aforesaid they expected in executing their said agreement to encounter, and actually did encounter, very difficult work, which could not be done at the stipulated price to be paid to the plaintiffs therefor, as aforesaid, but the plaintiffs hoped to be compensated for such loss by the profit they expected to make on their contracts with other parties, who undertook to construct the remainder of said 160 miles, as aforesaid.

And the plaintiffs further aver that from the time they so entered upon the said work until on or about the 15th day of December, A. D. 1872, they prosecuted the same with all the energy and skill they possessed, having men in large numbers, to wit, more than 1,000 in number, at work, with suitable teams and other equipments, along the whole line of said 160 miles of road, and incurring much extra expense
90 not contemplated in the said agreements made by the plaintiffs; but in order that the work might be done in the best manner and to the entire satisfaction of the defendant, and down to the date last aforesaid, the said defendant, by its proper officers, had expressed entire satisfaction with the manner in which the plaintiffs were doing the work provided to be done by them under their said agreement, and with the

rate of progress the plaintiffs were making towards the completion of such work; and all the work so done by the plaintiffs was approved of by the cheif engineer of the said railroad company as being in entire conformity to the plaintiffs' said agreements in that behalf; and at the date last aforesaid the plaintiffs had actually completed, to the satisfaction of the said cheif engineer and of the said defendant, fifty-three miles of said railroad westerly from said Stevens' Point, and nearly finished the remaining seven miles necessary to complete that portion of the work which they had not contracted with other parties to have performed as aforesaid.

91 And the plaintiffs further aver that at the date last aforesaid, and while the plaintiffs with a large force of men and teams, with all the necessary tools and apparatus, were actually and successfully prosecuting said work as aforesaid, and while the said defendant was indebted to the plaintiffs in a large sum, to wit, the sum of two hundred and fifty thousand dollars, for payment due to the plaintiffs for work done under the provisions of the aforesaid contracts, without any notice to or information on the part of the plaintiffs that it, the said defendant', was laboring under financial embar'as'ments, they, the said plaintiffs, were suddenly, to wit, at the date last aforesaid, notified by the defendant that it was unable to pay the sum last aforesaid due to the plaintiffs, or any part thereof, and was wholly destitute of means to make future payments upon said contracts to the plaintiffs, and so left the plaintiffs to shift for themselves and save what they could from the wreck of the undertaking; and ever since the said defendant has continued to be insolvent, and has utterly failed and refused to pay

92 the aforesaid sum due the plaintiffs for work done as aforesaid, or any part thereof, whereby the said defendant by its own fault, and without the consent of the plaintiffs, or any fault on their part, rendered any further work by the plaintiffs under the said contracts impossible, and so the plaintiffs were in fact thereby absolved from all further attempts to perform the same. And the plaintiffs further aver that, in addition to the amounts due them as aforesaid for work done under the said contracts in pursuance of the stipulations therein contained, including the bonuses and retained percentage therein agreed to be paid, the plaintiffs suffered special damages by reason of the premises aforesaid in a large amount, to wit, the further sum of two hundred and fifty thousand dollars, which sum is now also due to the plaintiffs from the defendant; and they specify the following items of such special damages:

First. The cost of hiring and transporting from Chicago to said Stevens' Point a large number, to wit, one thousand men, to work under said contracts immediately prior to their unlawful abrogation by the defendant as aforesaid, so that the plaintiffs wholly lost such

93 cost; which was a large sum, to wit, the sum of ten thousand dollars.

Secondly. The cost of erection by the plaintiffs along the line of said railroad, in the fall of 1872, a large number, to wit, fifty houses, for the accommodation of their workmen during the ensuing winter; which cost was a large sum, to wit, the sum of ten thousand dollars, and which was wholly lost to the plaintiffs by reason of the premises aforesaid.

Thirdly. The cost of a supply-road, constructed through heavy timber in the fall of 1872, to enable supplies of provisions and other necessaries to reach said line of railway from adjacent settlements during the ensuing winter; which cost was a large sum, to wit, the sum of ten thousand dollars.

Fourthly. The cost of collecting together, housing, and guarding the tools and equipments of the plaintiffs on said line of railroad during the winter of A. D. 1872-'3, made necessary by the aforesaid acts of the defendant; which cost was a large sum, to wit, the sum of five thousand dollars, and which was wholly lost to the plaintiffs.

Fifthly. The depreciation in valne of the plant or stock of the plaintiffs, collected by them for the purpose of carrying on the work
94 provided to be done by them under the said contracts, including teams, implements, and equipments of every sort usual on railroad work, and which stock was suddenly rendered unavailable to the plaintiffs, in a wild, unsettled region, by reason of the aforesaid unlawful acts of the defendant; which depreciation was a large sum, to wit, the sum of ten thousand dollars.

Sixthly. The losses suffered by the plaintiffs from litigation and controversies with various parties who, with the consent of the defendant, had taken contracts from the plaintiffs to perform the work necessary to be done, under the said agreements executed by the defendant, on the westerly one hundred miles of said railroad, work upon which contracts was necessarily terminated by the aforesaid default on the part of the defendant; which losses so suffered by the plaintiffs amounted to a large sum, to wit, the sum of thirty thousand dollars.

Seventhly. The damage suffered by the plaintiffs by reason of the loss to them of the profits at which they had let to other parties, with the consent of the defendant, the whole work to be done on the west-
95 erly one hundred miles of said railroad as specified in the said agreements executed by the defendant, and which profits they, the said plaintiffs, were wholly deprived of by the aforesaid wrongful acts and default of the defendant; which profits amounted to a large sum, to wit, the sum of one hundred and seventy-five thousand dollars.

And the plaintiffs say that, although often requested so to do, the said defendant hath not paid to the plaintiffs the said sums of money so due from it to them as aforesaid, or any part, but wholly neglects and refuses so to do, and so hath not kept and performed its said covenants, but hath wholly broken the same, to the damage of the said plaintiffs five hundred thousand dollars.

SLEEPER & WHITON,
Pl'ffs' Att'ys.

Filed Feb'y 21, 1873.

W'M H. BRADLEY, *Clk.*

96 Afterwards, to wit, on the 5th day of March, A. D. 1873, said defendant, by its attorney, filed in said clerk's office its demurrer in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer to declaration.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In the circuit court of the United States for the northern district of Illinois for the March term, A. D. 1873.

M. T. SEYMOUR, E. S. ALEXANDER, JOSEPH O. Rutter, & A. J. Hopper, partners as M. T. Seymour & Co.,
vs.
PHILLIPS & COLBY CONSTRUCTION CO.
} Demurrer.

And the said Phillips & Colby Construction Company comes and de-

fends the wrong and injury when, etc., and says that the plaintiff ought not to have and maintain its action aforesaid thereof against it, because it says that the declaration aforesaid and the matters therein contained are insufficient in law to have and maintain the action aforesaid of
97 the plaintiff against it, to which declaration it, the said Phillips & Colby Construction Company, has no necessity, nor is the defendant by the law of the land bound in any way to answer, and this it is ready to verify.

Wherefore for want of sufficient declaration in this behalf it, the said Phillips & Colby Construction Company, prays judgment, and that the plaintiff may be barred from having its action aforesaid against it, etc.

And for further and special cause of demurrer in law the said Phillips & Colby Construction Company assigns to the court here the causes following, that is to say—

1st. That the plaintiffs in their said declaration do not aver or show a performance by them of conditions precedent on their part, nor do they excuse such performance.

2nd. That said plaintiffs do not show any breach or violation of the terms of their said contracts, respectively, nor any breach or violation of any of the covenants on defendant's part to be performed.

98 3d. That the plaintiffs in their said declaration set forth and all lege certain supposed waivers of conditions or changes in regard to the work, and do not show in what way such supposed waivers or changes of terms were made.

4th. That the several and respective claims made by said plaintiffs in their said declaration are not such as are authorized by law nor by the terms of the supposed covenants.

5th. That the plaintiffs in said declaration only state their cause of action argumentatively, and not by way of alleging performance according to the contract, nor by way of showing prevention or other sufficient excuse for non-performance.

6th. And also for that the said declaration is in other respects uncertain, defective, and informal.

By C. D. ROYS,
Att'y for Def't.

DENT & BLACK, *of Counsel.*

(Endorsed:) Filed March 5, 1873. W'm H. Bradley, cl'k.

99 Afterwards, to wit, on the 14th day of March, in the March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

Demurrer taken under advisement.

MARK T. SEYMOUR, ET AL.
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the demurrer of the defendant to the declaration filed herein, and after hearing the arguments of counsel the court takes the same under advisement.

Afterwards, to wit, on the 24th day of March, in the March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

Demurrer overruled.

MARK T. SEYMOUR, ET AL.
v.
THE PHILIPS AND COLBY CONSTRUCTION COMPANY. } Assumpsit.

100 The court having considered and being now fully advised upon the demurrer of the defendant to the declaration herein, overrules the same.

101 On this day, to wit, the 16th of April, A. D. 1873, said defendant, by its attorney, filed in said clerk's office its pleas in said entitled cause, which said pleas are in words and figures following, to wit:

Pleas.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States of the northern district of Illinois.

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, Joseph O. Rutter, and Andrew J. Hopper
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } In covenant.

1. And the said defendant, by C. D. Roys, its attorney, comes and defends the wrong and injury when, &c., and says that the said plaintiffs ought not to have and maintain their aforesaid action thereof
102 against the said defendant, because it says that the said supposed contracts or articles of agreement in said plaintiffs' declaration set forth are not its deeds; and of this it puts itself upon the country, &c.

2. And for a further plea in this behalf the defendant says "actio non," because it says the defendant at all times since the making of the supposed contracts in the declaration mentioned has truely kept, observed, and performed each and every of the supposed covenants on the part of the defendant in the said several contracts mentioned, in manner and form as required by said contracts, severally and respectively, in the payment of all and every the sums of money which have at any time become due the plaintiffs according to the terms of said contracts, and in that the said defendant hath at all times been ready to receive from said plaintiffs the work and materials by said contracts required to be done and promised by the plaintiffs, and to pay the same according the terms and effect of said several contracts, whereof the said plaintiffs have
103 always had notice; and this the said defendant is ready to verify. Wherfor' it prays judgment if the said plaintiffs ought to have and maintain their aforesaid action thereof against it, &c.

3. And for a further plea in this behalf the defendant says "actio non," because it says that the defendant heretofore, to wit, on the 18th day of December, A. D. 1872, in said district, paid the said plaintiffs a large sum of money, to wit, the sum of forty-eight thousand dollars, in full satisfaction and discharge of the supposed breaches of covenant in the declaration mentioned, which said sum the said plaintiffs then and there

accepted, received of and from the said defendant, in full satisfaction and discharge of the supposed damages to the said plaintiffs by them alleged to be sustained by reason of said supposed breaches of covenants; and this said defendant is ready to verify. Wherefore it prays judgment if the said plaintiffs ought to have and maintain their aforesaid action against it, &c.

104 4. And for a further plea in this behalf, as to the supposed breaches of covenant in the declaration mentioned, in that the said plaintiffs are supposed to have suffered loss because and for that the defendant notified the plaintiffs that the defendant was destitute of means to make future payments upon said supposed contracts in the declaration mentioned, the said defendant, protesting, &c., says that it, the said defendant, was, to wit, on the 15th day of December, A. D. 1872, at said district, ready and willing and offered to allow the said plaintiffs to proceed with the performance of the supposed contracts in the declaration mentioned, according to the intent and meaning thereof, and was also then and there able & ready and willing to pay the said plaintiffs whatever monies thereafter might become due the plaintiffs under the said contracts, as and when such monies should become due, if the said plaintiffs would proceed under said contracts, whereof the said plaintiffs then and there had notice; but the said plaintiffs then and there wrongfully neglected and refused to abide by or further

105 perform the said contracts on the part of the said plaintiffs, and the said plaintiffs then and there wholly declined and disavowed any willingness on their part to proceed under said contracts, and discharged the said defendant from the carrying of the said several contracts into further execution as to such work thereafter to be done under said contracts on the part of the said plaintiffs; and this the said defendant is ready to verify. Wherefore it prays judgment if the said plaintiffs ought to have and maintain their aforesaid action thereof against it, &c.

5. And for a further plea in this behalf, as to the supposed breach of covenant in that the defendant is alleged to have prevented, excused, or absolved the said plaintiffs from further performing their supposed contracts in the declaration mentioned, the said defendant says that before and at the time of such supposed prevention or absolution the said plaintiffs had of their own wrong, and without the causes or excuses or any of them in the declaration mentioned, failed to observe,

106 keep, or perform the said contracts on their part according to the intent and meaning of the same, respectively, and had then and there wrongfully refused to prosecute the performance of the work required of them by said contracts with such force and means as would in fact, or in the opinion of the cheif or assistant engineers of the Wisconsin Central Railroad Company, ensure the completion of the work, or any part thereof thereafter to be done, in the time or manner in that behalf limited by said contracts, respectively; and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against it, &c.

6. And for a further plea in this behalf, as to the alleged breach of covenant in that this defendant is in the declaration supposed to have notified the plaintiffs that this defendant was unable to pay the sum then due from the defendant to the plaintiffs, or any part thereof, and was wholly destitute of means to make future payments upon

107 said contracts, and in that the defendant is alleged to have been and continued to be insolvent, the defendant says that the plaintiffs ought not to have and maintain its action aforesaid, because defendant

says that it did not give any such notice to the plaintiffs, and did not absolve or excuse the plaintiffs as the declaration alleges, and was not in fact insolvent in manner and form as by the declaration is supposed; and of this the said defendant puts itself upon the country, &c.

7. And for a f*uture* plea in this behalf, as to so much of the plaintiffs' demands in the declaration as is for anticipated profits in respect to the construction of the westerly one hundred miles of that part of the railroad which is referred to in the supposed articles of agreement of January 25th, 1872, the defendant says "actio non," because it says that the said defendant did not give its written assent to the reletting by said plaintiffs of the work on the said one hundred miles, or any part thereof, nor did it approve of the supposed reletting of said work by said plaintiffs, as said declaration supposes, nor did the said plaintiffs prosecute or
108 cause to be prosecuted the work on said one hundred miles according to the tenor and effect of the said supposed article of agreement of January 25th, 1872, and July 18th, 1872; and of this the defendant puts itself upon the country, &c.

8. And for a further plea in this behalf, as to the supposed breaches of covenant in respect to the westerly one hundred miles of the portion of the railroad which is referred to in said supposed contract of January, 25th, 1872, the said defendant says, "actio non," because it says the said plaintiffs did not relet the work on said one hundred miles of said railroad with the approval of the defendant in manner and form as by the declaration is supposed, nor were the said plaintiffs causing the work on said one hundred miles to be prosecuted according to their agreement in that behalf; and of this the said defendant puts itself upon the country, &c.

9. And for a further plea in this behalf, as to the supposed breach of covenant in the alleged stoppage of the work of the plaintiffs
109 under the supposed contracts in the declaration mentioned, the said defendant says "actio non," because the defendant says that heretofore, to wit, on the 15th day of December, A. D. 1872, at the district aforesaid, it was, in the opinion of the defendant, necessary to stop the work under said supposed contracts for a short period of time, to wit, during the extreme cold weather, which had then set in, as by the terms the said contracts said defendant was authorized to do, and the defendant avers that this was the only stoppage of the work caused, authorized, permitted, or excused by the defendant; and this the said defendant is ready to verify. Wherefore he prays judgment if the said plaintiffs ought to have or maintain their aforesaid action thereof against it, &c.

10. And for a further plea in this behalf, the defendant says "actio non," because it says it has not broken the said covenants in the said declaration mentioned, or any or either of them, in manner and form as the said plaintiffs have above thereof declared against it; and of this the defendant puts itself upon the country, &c.

110 11. And for a further plea in this behalf, as to the alleged breach of covenant in the non-payment of two hundred and fifty thousand dollars for work supposed to have been done under the contracts in the declaration mentioned, the said defendant, protesting that it does not owe said sum, nevertheless say that the said plaintiffs have not furnished to the said defendant any certificate or estimate of the ch*eif* engineer of the Wisconsin Central Railroad Company, or the ch*eif* engineer on the work, showing such sum or any part thereof to be due said plaintiffs for work done under said contracts in manner and

form as required by said contracts in that behalf; and of this the said defendant puts itself upon the country, &c.

12. And for a further plea in this behalf, the said defendant says that the said plaintiffs ought not to have or maintain their action aforesaid, because the said defendant says that the said plaintiffs, before and at the time of the commencement of this suit, were and still are
111 indebted to the said defendant in a large sum of money, to wit, the sum of five hundred thousand dollars, for so much money before then paid, laid out, and expended by the said defendant for the said plaintiffs, at their request, and in a like sum for so much money before then had and received by the said plaintiffs for the use of the said defendants, and in a like sum for certain damages which before then happened to the said defendant, and became due and owing from the said plaintiffs to the said defendant, in that the said plaintiffs did not, according to their covenant in that behalf in said contract of July 18th, 1872, keep or save the said defendant harmless against all claims or demands upon said defendant for the price of labor, work, materials, and supplies performed, done, or furnished to or on account of said plaintiffs, and by reason of the said plaintiffs failing so to keep and save the said defendant harmless the said defendant was, to wit, on the 17th day of February, A. D. 1873, at said district, put and subjected to great loss, outlay of money, and legal liability, to wit, in the sum first in
112 this plea mentioned; and also the said defendant, on the day and year first aforesaid, at said district, and without any fault on the part of the defendant, had suffered and been subjected to great loss and damages for that the said plaintiffs made default in the performance of their covenant to complete the work on the first section of forty miles of said road by and on the first day of September, A. D. 1872, as required by their said covenant in that behalf, and for that the plaintiff also made default in the performance of their covenant to complete the work on the third section of twenty miles of said road by or on the fifteenth day of September, A. D. 1872, and for that the plaintiffs also made default in the performance of their covenant to complete the work on the fourth section of twenty miles of said road by or on the fifteenth day of November, A. D. 1872, and also for that the plaintiffs so made default in the performance of their covenant to complete the work on the fifth section of twenty miles of said road by or on the fifteenth day of December, A. D. 1872,
113 according to the several covenants of the said plaintiffs in that behalf; by reason of which said defaults of said plaintiffs the said defendant then and there also lost divers great gains and emoluments which would have accrued to said defendant for the use of said parts of said railroad if the same had been completed according to the said covenants of said plaintiffs, the whole amounting to a large sum, to wit, six hundred thousand dollars, and for which said plaintiffs were then and there liable to said defendant; and out of which said sums of money so due and owing from the said plaintiffs to the said defendant, the said defendant is ready and willing, and hereby offers to set off and allow to said plaintiffs so much as will be sufficient to satisfy the damages by them sustained, on occasion of the supposed breaches of covenant in the declaration mentioned, according to the form of the statute in such cases made and provided, &c.; and this the said defendant is ready to verify. Wherefore it prays judgment if the
114 plaintiffs ought to have or maintain their aforesaid action thereof against it, &c.

13. And for a further plea in this behalf, the said defendant says that the said plaintiffs ought not to have or maintain their action aforesaid, be-

cause the said defendant says that the supposed breaches of covenant in the said declaration assigned were committed by the leave and license of the said plaintiffs to the said defendant for that purpose first given and granted, to wit, on the fifteenth day of December, A. D. 1872, at said district; and this the said defendant is ready to verify. Wherefore he prays judgment if the plaintiffs ought to have or maintain their aforesaid action thereof against it, &c.

14. And for a further plea in this behalf, as to so much of the supposed breach of covenant on the part of the said defendant as is assigned with reference to the work that remained to be done by the
115 plaintiffs under the supposed contracts in the declaration mentioned, on the fifteenth day of December, A. D. 1872, the said defendant says the said plaintiffs ought not to have or maintain their action aforesaid, because the said defendant says that the said plaintiffs heretofore, and when the said defendant was ready, willing, and entitled to demand the performance of said work by the plaintiffs, to wit, on the fifteenth day of December, A. D. 1872, at said district, absolved, exonerated, and discharged the defendant from receiving from the said plaintiffs any part of such work, or paying therefor; and this the said defendant is ready to verify. Wherefore it prays judgment if the plaintiffs ought to have or maintain their aforesaid action against it, &c.

15. And for a further plea in this behalf, as to so much of the breach assigned as relates to the work supposed to have been done by the plaintiffs under the contracts in the declaration mentioned, the said defendant says that the said plaintiffs ought not to have or main-
116 tain their action aforesaid, because the said defendant says that a large part of the moneys by the declaration supposed to be due the plaintiffs for said work, to wit, two hundred thousand dollars, was paid by the said defendant to the said plaintiffs, to wit, on the fifteenth day of December, A. D. 1872, at said district; and as to the residue of said moneys, the said defendant says that the said plaintiffs had then and there disregarded their covenants, contained in said contracts in in the declaration set forth, in respect to completing the parts of the work which were to be done and completed by them on or before said time, especially as required by said contract of July 18th, 1872; and also the said plaintiffs had then and there wrongfully failed and neglected to pay the laborers employed by said plaintiffs upon the work, to a large amount, to wit, $35,000.00; and the said plaintiffs had also then and there failed to pay for supplies and materials furnished or caused to be furnished by them for such work, to a large amount, to wit, $25,000.00; and it then and there became, in the opinion of this
117 defendant, and in fact was necessary for the defendant in order to secure to the said laborers the moneys so due them, and in order to secure to the persons who had furnished such supplies and materials the moneys so due them therefor, and to save the defendant from claims against it for such labor, supplies, and materials, to retain said sums of money so due such laborers, and said moneys so due for such supplies and materials, until the amounts could be ascertained; and thereupon, and so soon as such amounts could be ascertained, to wit, on the 15th day of January, A. D. 1873, at said district, the said defendant paid over to such laborers and to the persons who furnished such supplies and materials the several sums due them, severally and respectively, from the plaintiffs, as the said defendant was then and there authorized by the plaintiffs to do, and which sums so paid by said defendant to such laborers and for such supplies and materials exceed the whole residue of the moneys supposed to be due from the defendant to the plaintiffs for said work.

118 And this the said defendant is ready to verify. Wherefore it prays judgment, &c.

C. D. ROYS,
Def't's Att'y.

119 *M. T. Seymour, Elijah S. Alexander, Joseph O. Rutter, Andrew J. Hopper, to the Phillips & Colby Construction Co., Dr.*

To money paid, laid out and expended for you	$50,000 00
To money had and received for our use	$50,000 00
To money paid your laborers	50,000 00
To money paid for materials furnished for you	50,000 00
To damages for your non-performance of work	300,000 00
To money paid by reason of your not indemnifying us as agreed	50,000 00
To moneys due us from you on account of your not completing the several parts of the R. R., according to agreement	200,000 00
To loss to us from not having use of the parts of the road which ought to have been completed by you earlier	200,000 00

Filed April 16, 1873.

W'M H. BRADLEY, *Clk.*

120 Afterwards, to wit, on the 23d day of April, A. D. 1873, said plaintiff, by its attorneys, filed in said clerk's office their demurrer to the plea in said entitled cause, which said demurrer is in words and figures following, to wit:

Demurrer to plea.

Cir. c't, U. S. N. D. Ill's.

SEYMOUR ET AL.
vs.
PHILLIPS & COLBY CONS'N CO. } Demurrer.

And the plaintiff, by Sleeper & Whiton, their attorneys, come and defend the wrong & injury, when, &c., and say that the plea of the defendant by it eleventhly above pleaded, and the matters & things therein contained, in manner & form as the same are therein stated & set forth, are not sufficient in law to bar the plaintiffs' aforesaid action thereof against the defendant, & so the plaintiffs in law are not bound to reply to the same, & this they are ready to verify. Wherefore they pray judgment, &c.

The plaintiffs also specify the following grounds of special demurrer to said eleventh plea:

1. Said plea tenders an immaterial issue. *Verification.*
2. Said plea should have concluded with a verification.
3. The facts admitted by said plea show a liability, notwithstanding the matters set up in said plea by way of pretended avoidance
121 of the effect of such admissions.

SLEEPER & WHITON,
Pl'ffs' Att'ys.

(Endorsed:) Filed April 23d, 1873. W'm H. Bradley, cl'k.

122 Afterwards, to wit, on the 23d day of April, A. D. 1873, said plaintiffs, by their attorneys, filed in said clerk's office their replications in said entitled cause; which said replications are in the words and figures following, to wit:

Replications.

Circuit court of the United States, northern district of Illinois.

MARK T. SEYMOUR ET AL.
vs.
PHILLIPS & COLBY CONSTRUCTION COMPANY.

And the plaintiffs, as to the plea of the defendant by it secondly above pleaded in bar, say that they ought not to be barred of their action aforesaid, because they say that the said defendant was not, at all times, nor at any time since the making of the contracts in the declaration mentioned, truly kept, observed, and performed each and every of the covenants in said contracts contained on its part to be
123 kept, observed, and performed, in manner and form as required by said contracts respectively, by the payment of all and every the sum of money which had at any time become due to the plaintiffs, according to the tenor of said contracts, and by at all times continuing ready to receive from the plaintiffs the work and materials by said contracts required to be done and furnished by the plaintiffs, and to pay for the same according to the tenor and effect of said contracts in manner & form as the defendant has in its said plea alleged; and this they, the said plaintiffs, pray may be enquired of by the country, &c.

SLEEPER & WHITON,
Pl'ffs' Att'ys.

124 And the plaintiffs, by way of replication to the said plea by the defendant thirdly above pleaded, say precludi non, because they say that the said defendant did not, on the 18th day of December, 1872, or at any other time, pay to the plaintiffs forty-eight thousand dollars or any other sum of money or thing whatever in satisfaction and discharge of the breaches of covenant on the part of it, the said defendant, in the said declaration mentioned; nor did the plaintiffs ever at any time receive of and from the said defendant the said sum of money or any other sum in satisfaction and discharge of the damages to the plaintiffs by them alleged in the declaration to have been sustained by reason of the breaches of covenant on the part of the defendant, as mentioned in the said declaration, in manner and form as the defendant hath above in such plea in that behalf alleged; and this the plaintiffs pray may be enquired of by the country, &c.

SLEEPER & WHITON,
Pl'ffs' Att'ys.

125 And the plaintiffs, by way of replication to the said plea by the defendant fourthly above pleaded, say precludi non, because they say that while it is not true, as in said plea averred, that at the time when it is stated in said declaration that the said defendant notified the plaintiffs that it was destitute of means to make future payments upon the said contracts, it was in fact then and there able and ready and willing to pay the plaintiffs whatever money might thereafter become due them under the said contracts when such moneys should be-

come due if the plaintiffs would proceed under such contracts, or did then and there offer to allow the plaintiffs to proceed with the performance of such contracts, yet the plaintiffs aver that they did not at the date last mentioned, or at any other time, wrongfully neglect or refuse to abide by and further perform the said contracts on their part, nor did they then or there or any time decline and disavow any willingness to proceed under the said contracts, and so discharge the said defendant from the carrying of the said contracts into further execution
126 as to the said work thereafter or at any other time to be done under the said contracts by the said plaintiffs, in manner and form as the defendant hath above in such plea in that behalf alleged; and this the plaintiffs pray may be enquired of by the country, &c.

SLEEPER & WHITON,
Pl'ffs' Att'ys.

127 And the plaintiffs, replying to the plea of the defendant fifthly above pleaded, say precludi non, because they say that at the time of the prevention by the defendant of the prosecution of the work under said contracts by the plaintiffs, and the absolution by the defendant of the plaintiffs from further continuing to prosecute such work in manner and form as stated in the declaration, the defendant had then and there excused any supposed omissions on the part of the plaintiffs to perform such work strictly in accordance with the terms of said contracts, and had then and there accepted the work done by the plaintiffs as a sufficient compliance on their part with all the covenants in said contracts contained down to the date of such prevention and absolution by the defendant; nor did the defendant at any time notify the plaintiffs that it had elected to cancel said contracts by reason of the failure or refusal, in its opinion, of the plaintiffs to comply with any of the stipulations in said contracts or at any time communicate to the
128 plaintiffs, in writing or otherwise, the opinion of the defendant or of any of the engineers of the Wisconsin Central Railroad Company that the plaintiffs had neglected or refused to progress with the said work as fast as would be necessary for the completion thereof within the time specified in said contracts; but, on the contrary, the plaintiffs at the time of such prevention and absolution by the defendant was, in fact, prosecuting the work required to be done by said contracts with such vigor and means as would have enabled the plaintiffs to fully complete such work within the time limited by said contracts; and this the plaintiffs are ready to verify. Wherefore they pray judgment, obtain said damages & costs to be adjudged to them.

SLEEPER & WHITON,
Pl'ffs' Att'ys.

129 And the plaintiffs, replying to the plea by the defendant ninthly above pleaded, say precludi non, because they say that it is not true, as is alleged in such plea, that the stoppage of plaintiffs' work under said contracts, as mentioned in the declaration, was for the reason that, in the opinion of the defendant, it was necessary so to stop on account of the state of the weather, in manner and form as is set forth in such plea, but, on the contrary, at the time of such stoppage the weather was altogether favorable for the prosecution of such work by the plaintiffs, and no notice was ever given to the plaintiffs that, in the opinion of the defendant, it was necessary to stop said work on account of the weather; and this the plaintiffs pray may be enquired of by the country, &c.

SLEEPER & WHITON,
Pl'ffs' Att'ys.

130 And the plaintiffs, replying to the plea of the defendant twelfthly above pleaded, say precludi non, because they say that the plaintiffs are not indebted to the defendant in manner and form as the defendant in its said plea has alleged against them; and this they pray may be enquired of by the country, &c.

SLEEPER & WHITON,
Pl'ffs' Att'ys.

And the plaintiffs, replying to the plea of the defendant thirteenthly above pleaded, say precludi non, because they say that the defendant, when it committed the breaches of covenant assigned and set forth in the declaration, in manner and form as therein mentioned, did not have the leave or license of the plaintiffs so to do, at any time whatever, in manner and form as stated in such plea; and this the plaintiffs pray may be enquired of by the country, &c.

SLEEPER & WHITON,
Pl'ffs' Att'ys.

131 And the plaintiffs, replying to the plea of the defendant by it fourteenthly above pleaded, say precludi non, because they say that they did not, at any time, absolve, exonerate, and discharge the defendant from receiving from the plaintiffs, and paying for all or any part of the work referred to in said plea, in manner & form as therein stated; and this the plaintiffs pray may be enquired of by the country, &c.

SLEEPER & WHITON,
Pl'ffs' Att'ys.

And the plaintiffs, replying to the plea of the defendant by it fifteenthly above pleaded, say precludi non, because they say that the defendant did not, at any time, pay to the plaintiffs, or for their use, or on their account, divers sums of money in full satisfaction and discharge of the sums of money due the plaintiffs for work performed under the said contracts, in manner and form as the defendant hath thereof, in its said plea, in that behalf alleged; nor did the plaintiffs at any time disregard their covenants in the said contracts con-
132 tained, with respect to completing the parts of said work as in said contracts specified, in manner and form as stated in said plea; nor did the plaintiffs at any time fail or neglect to pay the laborers employed by them on such work in any sum of money whatever, or to pay for supplies or materials furnished to them for such work, in any sum of money whatsoever, in manner and form as stated is said plea; but these plaintiffs aver that if the said defendant has at any time paid any sums of money to laborers employed by the plaintiffs upon such work, or for supplies or materials furnished to the plaintiffs for such work, such payments were merely voluntary on the part of the defendant, wholly without authority either from the plaintiffs or under the provisions of said contracts; and this the plaintiffs pray may be enquired of by the country, &c.

SLEEPER & WHITON,
Pl'ffs' Att'ys.

Filed April 23, 1873.

W'M H. BRADLEY, *Clk.*

133 Afterwards, to wit, on the 24th day of April, in the March

term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

Leave to amend 12th plea, &c.

MARK T. SEYMOUR ET AL.
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } Covenant.

Now come the parties by their attorneys, and thereupon the defendant, by leave of the court, withdraws its eleventh plea filed herein, and stipulates that the plaintiffs may reply new matter to said pleas; and, on motion, leave is given the defendant to amend its twelfth plea herein by Monday morning next.

134 Afterwards, to wit on the 30th day of April, A. D. 1873, said defendant, by its attorneys, filed in said clerk's office its amended plea in said entitled cause; which said plea is in the words and figures following, to wit:

Amended plea.

UNITED STATES OF AMERICA,
Norther' District of Illinois, ss:

In the circuit court of the United States for said district.

MARK S. SEYMOUR ET AL.
vs.
PHILLIPS & COLBY CONSTRUCTION COMPANY. } Amended twelfth plea.

And for a further plea in this behalf, the said defendant says that the said plaintiffs ought not to have or maintain their said action aforesaid, because the said defendant says that before and at the time of the commencement of this suit the said plaintiffs were, and still are, in-
135 debted to the said defendant in a large sum, to wit, in the sum of five hundred and fifty thousand dollars; for that on the said 18th day of July, 1872 the said plaintiffs made and entered into the said contract of that date with the defendant, as is in and by their said declaration set forth, and thereby then and there among other things covenanted and agreed to and with the said defendant that they, the said plaintiffs, would, for the certain compensation in the said contract set forth, do and perform certain work and labor in and about the construction of one hundred and sixty miles of the Wisconsin Central Railroad Company, according to the various specifications and requirements on their part in said contract contained or referred to, and to have the first section of forty miles westwardly from Stevens' Point fully completed by the first day of September, 1872, and the next twenty continuous miles fully completed by the fifteenth day of September, 1872, and the next continuing twenty miles fully completed by the fifteenth day of November, 1872, and the next continuing twenty miles fully completed by the fifteenth day of December, 1872; all which work was
136 to be done to the satisfaction and acceptance of the chief or assistant engineers of the Wisconsin Central Railroad Company,

or of this defendant; and at and before the ensealing and delivery of the said contract the said defendant had made and entered into a contract with the Wisconsin Central Railroad Company for the construction of its said line of road, including the same one hundred and sixty miles sublet to the plaintiffs, by the terms of which contract the said defendant became and was entitled to the use, revenue, and income of all and singular the said line of railway until the same should be fully completed and delivered over by this defendant to the said Wisconsin Central Railroad Company; and this defendant was further entitled to have and receive from the said Wisconsin Central Railroad Company, as part compensation for constructing said railroad, twenty-five thousand dollars of first-mortgage bonds for each and every completed mile of railroad on the completion of each mile, which mortgage-
bonds were of great value, to wit, of the value of ninety per
137 cent. upon the par thereof, and of all which facts the said plaintiffs at and before the making of said contract of July 18th, 1872, had full notice, to wit, at the district aforesaid. And the said defendant says that the said plaintiffs wholly failed, neglected, and refused to keep and perform the covenants by them to be performed, in this that said plaintiffs did not fully complete, according to their covenants and the specifications of the contract, the work on the third section of twenty miles, thereby making a continuing, completed railroad of sixty miles from Stevens' Point, on or before the fifteenth day of September, 1872; nor did the said plaintiffs fully complete the work required by said contract on the fourth section of twenty miles on or before the fifteenth day of November, 1872; nor did said plaintiffs fully complete the work on the fifth section of twenty miles by the fifteenth day of December, 1872, but, on the contrary thereof, the said plaintiffs, disregarding their covenants in that behalf, wholly failed, neglected, and refused at all times to keep and maintain on the said work and at the proper points thereof a force of men and teams efficiently equipped and properly cared for,
sufficient, in the opinion of the chief or assistant engineers,
138 of the said railroad company, to complete the work on the said several sections within the times limited therefor, and failed and refused from time to time to comply with the specific orders of the said chief engineer to increase their said force of men and teams, so that the same might be adequate to complete the said sections within the several times limited therefor, and the said plaintiffs so disregarded their covenants, and negligently conducted themselves in the premises that, on the fifteenth day of November, 1872, they had only completed a small part, to wit, fifty miles of the work instead of eighty miles thereof, as by them agreed, although, up to the said date last aforesaid, the said defendant had fully performed each and every covenant by it to be performed in and by the said contract first aforesaid; and the said plaintiffs being so in default from time to time anterior to the said date last aforesaid, afterwards, to wit, on the 28th day of November, 1872, to wit, at said district, diminished their said forces on the work, and deliberately disabled themselves from proceeding therewith according to their cov-
enants, and then and there disposed of all their supplies on the
139 said work, and all their equipment of men and teams went out of service, and since hitherto the said plaintiffs have wholly failed, neglected, and refused to do any work on the said line of railroad, and have declared that they abandoned the same.

And the said defendant further says that the said plaintiffs wrongfully disregarded their further covenants in said contract, in this that they did not at all times keep and save the defendant and the Wisconsin

Central Railroad Company harmless against all claims or demands for the price of labor, work, materials, and supplies, performed, done, or furnished to or on account of the said plaintiffs; but, on the contrary thereof, the said plaintiffs, at and before the said abandonment of the work, had become and were in arrears to their laborers on said work, and to those who had furnished materials and supplies therefor to the said plaintiffs in a large sum, to wit, the sum of one hundred thousand dollars, and demand and claim was made for all and singular the said sums of money by the said laborers and material and supply-men on this defendant and the said Wisconsin Central Railroad Com-
140 pany; and notice of lien was given for all and singular such demands in accordance with the statutes of Wisconsin in such cases made and provided; and such claims for labor and supplies became and were liens against said railroad; and in order to protect said railroad from such liens, the said defendant was obliged to pay, and did then and there pay, all and singular the said demands for labor and supplies, the whole amounting to a large sum, to wit, one hundred thousand dollars.

And the defendant further says that, in consequence of the failure of the said plaintiffs to complete the work specified in said contract, and their abandonment of the same, this defendant has lost divers great gains and emoluments which would otherwise have accrued to the defendant; and this defendant will be compelled to relet the building and completing of the residue of said one hundred and sixty miles of road at prices much exceeding those specified in said contract of July 18th, 1872, to wit, at a loss to defendant of one hundred thousand dol-
141 lars; and defendant in fact says that the prices at which said work left unfinished by plaintiffs was to be done were favorable to the defendant, and lower than the actual cost of performing the said work; and on the reletting of the uncompleted portion of said work this defendant will be wholly unable to procure the work to be done on such low and favorable terms as the plaintiffs had covenanted to do the same; and that the actual costs of completing the said work according to the said contract will exceed the contract-price to the plaintiffs, payable, on their completion, at least one hundred and fifty thousand dollars, all and singular which damages has resulted from the wrongful breach of covenant and default of the said plaintiffs.

And by reason of the failure of the plaintiffs to finish and complete the said one hundred continuing miles of said railroad on or before December the 15th, A. D. 1872, as agreed, the defendant was put to great loss and damage, and wholly lost the gains, income, and use of said part of said road so left uncompleted continuously from the said contract-times of completion respectively since hitherto, to the great dam-
142 age of the defendant, viz, one hundred thousand dollars, which gain and profits would have accrued directly to the defendant, if the said plaintiffs had completed the said portion of said road by the respective times agreed as aforesaid.

And by reason of the failure of the said plaintiffs to complete the said sections of one hundred miles within the time agreed, this defendant has been wholly deprived of its compensation in payment therefor, and the profit on the construction of the same, and the use and benefit of the twenty-five thousand dollars first-mortgage bonds upon and for each and every mile of the said portion which the said plaintiffs failed to complete within the times agreed, to the great damage of the defendant, viz, the sum of two hundred thousand dollars.

And the said defendant further in fact says that the aforesaid sums

of money had, before and at the time of the commencement of this suit, accrued and become due to said defendant from said plaintiffs under and by virtue of the several covenants of the plaintiffs contained in and devolved upon said plaintiffs by said contract of July 18th, 1872,
143 and by reason of the non-observance by said plaintiffs of said covenants respectively. And the defendant hereby offers to set off and allow to said plaintiffs so much of said several sums as will equal the supposed damages claimed by the plaintiffs, &c.

And this the said defendant is ready to verify; wherefore it prays judgment, &c.

C. D. ROYS,
Def't's Att'y.

Filed April 30, 1873.

W'M H. BRADLEY, *Cl'k.*

On the same day, to wit, the 30th day of April, A. D. 1873, said defendant, by its attorneys, filed in said clerk's office i's similiter and rejoinder in said entitled ; which are in the words and figures following, to wit:

144 *Similiter & rejoinder.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the U. S. for said district, March term, A. D. 1873.

MARK T. SEYMOUR ET AL.,
vs.
THE PHILLIPS & COLBY CONSTRUCTON COMPANY. } In covenant.

And the said defendant, as to the replication of the said plaintiffs to each of the second, third, fourth, ninth, twelfth, thirteenth, and fifteenth pleas, whereof the said plaintiffs have prayed inquiry by the country, doth the like, &c.

And as to the replication to the fifth plea, the said defendant says that the matters and things contained in said replication are not true in manner and form as the same are therein stated and set forth; and of this the said defendant puts itself upon the country, &c.

By C. D. ROYS, *its Att'y.*

(Endorsed:) Filed April 30, 1873. W'm H. Bradley, cl'k.

145 Afterwards, to wit, on the 3d day of May, in the March term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following, to wit:

Jury empanneled, &c.

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, et al., who sue for the use of Mark T. Seymour et al.,
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } Covenant.

Now come the parties by their attorneys, and, by agreement, the de-

fendant, by its attorney, withdraws its eleventh plea filed herein, and the replication of the plaintiffs to the original twelfth plea herein to stand as the replication to the amended twelfth plea, and any evidence can be given under the replication which could be given under a special replication thereto. And, upon issue joined, thereupon, come a jury of good and lawful men, to wit, Milton H. Miller, James Allen,
146 Enos Pyle, William Durno, Reuben Prescott, Samuel Haynes, B. Beach Fellows, James Law, S. W. Hopping, August England, W. Whitton, and E. B. Baker, who were all duly elected, tried, and sworn well and truly to try said issue; and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed to Monday morning next.

Afterwards, to wit, on the 5th day of May, in the May term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

MARK T. SEYMOUR ET AL.
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } Covenant.

Now come again the parties by their attorneys, and now come also the jury in this behalf empanneled and sworn, except E. B. Baker, who is excused as a juror herein, with an ageeement of the parties by their attorneys, to try this cause with the eleven jurors, their verdict
147 to have the same effect as though rendered by a full panel; and, after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed to to-morrow morning.

On the next day, to wit, the 6th day of May, in said May term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

MARK T. SEYMOUR ET AL., &C.,
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } Covenant.

Now come again the parties by their attorneys, and now come also the eleven jurors in this behalf empanneled and sworn; and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

148 On the next day, to wit, the 7th day of May, in said May term, A. D. 1873, of said court in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

MARK T. SEYMOUR ET AL., &C.,
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } Covenant.

Now come again the parties by their attorneys, and now come also

the eleven jurors in this behalf empanneled and sworn; and after hearing additional evidence, without concluding the same, the further trial of the cause is postponed until to-morrow morning.

On the next day, to wit, the 8th day of May, in said May term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

MARK T. SEYMOUR ET AL., &C.,
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } Covenant.

149 Now come again the parties by their attorneys, and now come also the eleven jurors in this behalf empanneled and sworn; and thereupon it is ordered by the court that the further trial of this cause is postponed until to-morrow morning.

On the next day, to wit, the 9th day of May, in the May term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

MARK T. SEYMOUR ET AL., &C.,
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } Covenant.

Now come again the parties by their attorneys, and now come also the eleven jurors in this behalf empanneled and sworn; and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until Monday morning next.

150 On this day, to wit, the 12th day of May, in said May term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

MARK T. SEYMOUR ET AL., &C.,
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } Covenant.

Now come again the parties by their attorneys, and now come also the eleven jurors in this behalf empanneled and sworn; and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On the next day, to wit, the 13th day of May, in said May term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

MARK T. SEYMOUR ET AL., &C.,
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } Covenant.

151 Now come again the parties by their attorneys, and now come

also the eleven jurors in this behalf empanneled and sworn; and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On the next day, to wit, the 14th day of May, in said May term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

MARK T. SEYMOUR ET AL., &C.,
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMpany. } Covenant.

Now come again the parties by their attorneys, and now come also the eleven jurors in this behalf empanneled and sworn; and after hearing additional evidence, without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

152 On the next day, to wit, the 15th day of May, in said May term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

MARK T. SEYMOUR ET AL., &C.,
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMpany. } Covenant.

Now come again the parties by their attorneys, and now come also the eleven jurors in this behalf empanneled and sworn; and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On the next day, to wit, the 16th day of May, in the May term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

153 MARK T. SEYMOUR ET AL., &C.,
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMpany. } Covenant.

Now come again the parties by their attorneys, and now come also the eleven jurors in this behalf empanneled and sworn; and after hearing the concluding arguments of counsel, the hour of adjournment having arrived, the instructions of the court are postponed until to-morrow morning.

On the next day, to wit, the 17th day of May, in said May term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

Verdict, &c.

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, Joseph O. Rutter, and Alfred J. Hopper, who sue for the use of Mark T. Seymour, Elijah S. Alexander, and Joseph O. Rutter,
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY.
} Covenant.

154 Now come again the parties by their attorneys, and now come also the eleven jurors in this behalf empanneled and sworn, and after receiving the instructions of the court the jurors retired to consider of their verdict, and after a short absence the jurors returned into court the following verdict, to wit:

1st. We find that defendant had at the time of the breaches alleged in plaintiffs' declaration waived or excused the failure of the plaintiffs up to that time to complete certain parts of their contract within certain times in the contract mentioned, which time had then elapsed, and the plaintiffs were at the time of said alleged breach engaged in the performance of said contract with the consent of defendant.

2d. We find that the defendant had, at the time the plaintiffs stopped the work in question, given the plaintiffs to understand that defendant was financially unable to pay the estimate for work then done,
155 and would probably be unable for a time to pay future monthly estimates.

We, the jury, find from the evidence, that the defendant agreed to pay to plaintiffs the extra cost of doing the earth-work by trains on certain sections between forty and forty-six, and we also find from the evidence that such extra cost amounted to eleven thousand seven hundred and eight dollars, which should be added to the amount of damages found by the general verdict.

We, the jurors, find the issue for the plaintiffs, and assess their damages to the sum of one hundred and seven thousand three hundred and fifty-three dollars and forty-four cents.

And thereupon the defendant, by its attorney, moves the court for a new trial herein.

On the 27th day of June, A. D. 1873, said defendant, by its attorney, filed in said clerk's office its reasons for new trial in said entitled cause, which read in the words and figures following, to wit:

156 *Reasons for new trial.*

Circuit court of the United States for the northern district of Illinois.

M. T. SEYMOUR ET AL.
vs.
THE PHILLIPS & COLBY CONSTRUCTION CO.

And the said defendant having moved that the verdict be set aside and a new trial awarded, assigns the following reasons in support of said motion, to wit:

That the verdict is contrary to the evidence and the law of the case.

That the court erred in admitting incompetent testimony on the part of the plaintiffs.

That the court erred in excluding testimony offered by the defendant.

That the court erred in refusing the several prayers for instructions on the part of the defendant.

That the court erred in giving instructions to the jury.

That the court erred in exceeding the defendants' claim for damages for non-completion of work.

That the verdict is excessive.

157 That the special findings and special verdict, respectively, are erroneous, and not well founded in law, and not supported by the testimony.

Wherefore, and because injury has been done the defendant, the motion for a new trial is made, &c.

C. D. ROYS, *Def't's Att'y.*

(Endorsed:) Filed June 27, 1873. W'm H. Bradley, cl'k.

Afterwards, to wit, on the 2d day of July, in said May term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

MARK T. SEYMOUR ET AL.
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } Covenant.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant, heretofore entered herein, for a new trial of this cause; and, after hearing the arguments of counsel, the court takes the same under advisement.

158 Afterwards, to wit, on the 19th day of July, in the July term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

Judg't, &c.

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, Joseph O. Rutter, and Andrew J. Hopper, who sue for the use of Mark T. Seymour, Elijah S. Alexander, and Joseph O. Rutter,
vs.
THE PHILLIPS & COLBY CONSTRUCTION COMPANY. } Covenant.

The court having considered, and being now fully advised upon, the motion of the defendant heretofore entered herein for a new trial of this cause, overrules the same. And thereupon the defendant, by its attorney, moves the court in arrest of judgment; and the court, being now fully advised thereon, overrules said motion in arrest.

159 It is thereupon considered and adjudged by the court that the plaintiffs do have and recover of the defendant the said sum of one hundred and nineteen thousand and sixty-one dollars and forty-six cents, their damages so as aforesaid assessed, together with their costs and charges in this behalf expended, amounting to the sum of one hundred and thirty dollars and ninety-two cents, and that they have execution therefor.

160 On the hearing of said entitled cause, the following exceptions were taken and were allowed by the court and made of record, and are in the words and figures following, to wit:

Bill of exceptions.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court of the United States for the northern district of Illinois, July term, A. D. 1873.

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, Joseph O. Rutter, & Andrew J. Hopper, who sue for the use of Mark. T. Seymour, Elijah S. Alexander, and Joseph O. Rutter.
vs.
THE PHILLIPS AND COLBY CONSTRUCTION COMpany.

Be it remembered that, on the trial of the above-entitled cause, upon the issues joined therein, the plaintiffs, to support the issues on their part, offered in evidence a certain contract in writing between Hopper, Boyle & Seymour, of the one part, and the defendant, of the other part, which contract is dated September 7th, 1871, and is fully set out
161 in the declaration.

The plaintiffs also offered in evidence a certain contract in writing, dated January 25th, 1872, entered into between said Hopper, Boyle and Seymour, of the one part, and the defendant, of the other part, and which is fully set out in the declaration.

The plaintiffs next offered as evidence a certain other contract, bearing date July 18th, 1872, entered into between the plaintiffs of one part, and the defendants, of the other part, to wit: being same set out in the declaration.

Said two first mentioned contracts are not sealed, but are unsealed instruments, and as the same were severally and respectively offered, defendant for this cause objected to them severally as incompetent evidence in this action, but the court overruled the objection in each instance, and defendant, by its counsel, then and there excepted to the decision of the court admitting said contracts, severally and respectively.

The plaintiffs put in evidence certain estimates, made by the chief engineer of the Wisconsin Central Railroad Company, for work done under the aforesaid contracts, which estimates were upon nine large blanks, three of which, numbered respectively 1196, 1197, & 1198 were headed, "Engineer's estimate," showing the total amount of work done on the middle division of the Wisconsin Central Railroad up to the 31st day of October, 1872, by M. T. Seymour & Co., contractors.

162 "Amount done during the month of October, being the regular monthly estimate as per contract," and were certified as follows, at the foot of each of the same:

"ENGINEER'S OFFICE, *October* 31, 1872.

"I certify the above to be correct.

"D. W. WELLMAN,
"*Chief Engineer.*"

"Approved.

"E. B. PHILLIPS,
"*For Contractors.*"

Three others of which, numbered respectively 1304, 1305, and 1306, were entitled in the same way with the substitution of 30th of November, 1872, and November, instead of October 31st and October, as given in the former three, and were certified in like manner under the date of November 30, 1872.

And the other three of which, numbered respectively 1473, 1474, & 1475 were entitled in the same manner, with the difference that in these three the caption recited that they were for work to the 31st day of December, 1872, and professed to be for December; and said last-mentioned three were certified by said engineer as of December 31, 1872.

Said estimate numbered 1196 had reference to sections 41 to section 60 inclusive, and stated the total amount of work done thereon, exclusive of last former statement, to have been $35,607.96.

Said estimate numbered 1197 was for work done from section
163 61 to 80 inclusive, specifying work on sections 61, 72, 73, 76, 77, 78, 79, & 80 during said month of October to amount of $4,135.57.

Said estimate numbered 1198 was for work done from sec. 81 to 100 inclusive, specifying work done on section 81 and sections 86 to 93 inclusive, during said month of October, to the amount of $3,088.96.

Said estimate numbered 1304 was for work done on sections 81 to 100 inclusive, specifying work done on sections 81 and sections 86 to 93 inclusive, during the month of November, to the amount of $3,149.64.

Said estimate numbered 1305 was for work done during said month of November on sections 61 to 80 inclusive, specifying work done on sections 61 to 65 inclusive, and sections 71 to 80 inclusive, to the amount of $4,939.78.

Said estimate numbered 1306 was for work done during said month of November on sections 41 to 60 inclusive, to the amount of $15,519.81.

164 Said estimate numbered 1473 purported to be for work done during said month of December on sections 41 to 60 inclusive, to the amount of $5,599.51, and there was endorsed thereon a statement of said chief engineer, as follows:

"This estimate comprises the total amount of work done by M. T. Seymour & Co. on sections 41 to 60 inclusive.

"D. W. WELLMAN,
"*Chief Engineer.*"

Said estimate numbered 1474 purported to give the amount of work done during said month of December on sections 61 to 80 inclusive, stating the sum to have amounted to $2,328.43, and had thereon a further certificate or memorandum, as follows:

"This estimate comprises the total amount of work done by M. T Seymour & Co. on sections 61 to 80 inclusive.

"D. W. WELLMAN,
"*Chief Engineer.*"

Said estimate numbered 1475 purported to give the amount of work done during said month of December on sections 81 to 100 inclusive, specifying work done on section 81 and sections 86 to 93 inclusive, stating the same to have amounted to $2,114.05; and there was written on said estimate a further certificate, as follows:

"This estimate comprises the total amount of work done by M.
165 T. Seymour & Co. on sections 81 to 100 inclusive.

"D. W. WELLMAN,
"*Chief Engineer.*"

The amounts here stated being exclusive of the fifteen per cent. to be retained, which fifteen per cent. upon the said estimates, inclusive of the retained percentage previous estimates from sections 41 to 100 inclusive, amounted to $19,937.16, as shown by said estimates.

The said estimates are what are known as "monthly estimates," and are so denominated and indorsed, and represent all the work done on the road above section 40. Below section 40 payment in full had been made.

The testimony of David W. Wellman, for three years next prior to some time in Jan., 1873, chief engineer of the Wisconsin Central Railroad Co., identified said estimates as having been made by him as such chief engineer and delivered to the defendant. As to the estimates purporting to be for work done up to December 31st, 1872, the witness stated that such estimates were mainly for work done previous to December, but which was not included in the estimates for November, in making which it was designed to keep a margin back. This December estimate was an estimate of all the work done north of section forty
166 that had not been included in the prior estimates, and in making this December estimate witness added in, as under a final or closing estimate, the fifteen per cent. which had been reserved from the prior estimates; included it by direction of E. B. Phillips, president of the defendant company, though witness did not remember that Phillips used the word "final" in asking that such December or closing estimates be made.

There is a difference in the engineer's profession between current estimates and final estimates. A final estimate would have a certificate attached to it, as shown in the case of one exhibited having reference to work done on this road from sections one to forty inclusive; such certificate to said last-mentioned estimate being as follows:

"CH'S ENG'S OFFICE, W. C. R.,
"*Stevens P't, Wis., Sept.* 30, 1872.

"I certify that the work on sec's 1 to 40 inclusive, and specified in the contract made with Hopper, Boyle & Co., dated Sept. 7, 1872, and subsequently transferred to M. T. Seymour & Co., has been duly completed according to agreement, and that the within estimate of the same, which is final, shows the total amount of work done and also the amount now due on said contract.

"D. W. WELLMAN, *Ch'f Eng.*"

167 No such certificates accompanied any of the estimates on this road made for work above section forty, that is, above the first forty miles, to which the contract of September 7, 1871, referred.

And the witness testified that the work was not entirely finished on any of the continuous miles of the road above said section forty. Between sections fifty-five and sixty not a yard of earth had been taken out by excavation and put into the embankment. From section ninety and thence to the north end of the line no earth had been taken out; none put into the bank; no excavation had been made. As to the work above section forty, witness made no certificate such as would have accompanied a final estimate if the work had all been done.

The testimony of Elijah S. Alexander, one of the pl'ffs, sworn on their behalf, tended to prove that pl'ffs commenced work after the making of the contract of July 18, 1872, between sections 18 & 19, to which point the iron had been previously laid; that about Sept. 15, 1872, they had completed the road to section 40, above which point sub-contractors had been previously working to some extent; that then pl'ffs put their force

at work from section 40 to section 47, (counting each mile a section in all cases;) that each month an estimate would be made by the division
168 engineers, who returned the same to the chief engineer, (Wellman,) and said chief engineer would then make his monthly estimates embracing the work on each 20 miles, as 41 to 60, 61 to 80, & 81 to 100, in a monthly estimate as aforesaid, so far as work might be done in the month expired, & would give one copy of the estimates to pl'ffs and one to defendant, & witness for pl'ffs would come to d'f't's office in Chicago and receive pay for all the work, as well that of sub-contractors as that of pl'ffs, such estimates having always been paid up to Nov. 8, 1872; that plaintiffs' force continued to work as defendant knew until Nov. 28, 1872, when the track was laid to section 53; that a part of pl'ffs' force was then working between section 47 & section 53 to finish up after the track-layers; that def't at no time objected to the pl'ffs continuing the work, but on the contrary expressed a desire to have it pushed; that witness was engaged in a personal supervision over the work for the plaintiffs and on the line much of the time, but was called away for some 3 weeks in September, until near the last of that month; that as to the matter of energy in prosecuting the work, it was to defendant's satisfaction, as had been expressed to witnesss time and again by Reed, Phillips, & Wellman, concerned for def't and the Wisconsin Cen-
169 tral R. R. Co.; that they, on meeting witness, would congratulate him on his success and the amount of money there was in store for him beyond, saying he had a world of energy to stand up to the work as he was doing, knowing that plaintiffs were losing money on the work below section 60; that defendant made no request that witness did not comply with, and that plaintiffs increased their force from 300 men in July to between 500 & 600 in August & September, and as he thought had between 600 & 700 in Nov., including sub-contractors, Fitzgerald's men, after Fitzgerald quit work.

The witness was about to state why certain letters were written to him by Engineer Wellman, and more especially why one of such letters, dated Aug. 24, 1872, hereinafter given, was written. Defendant, by its counsel, objected, urging that defendant was entitled to the benefit of the letters requiring an increase of plaintiffs' working force, so that the letters when offered should speak for themselves; but the court overruled the objection, and held that the witness should be allowed to make the explanation, and def't, by its counsel, then & there excepted to the decision of the court allowing the witness to explain, and said witness thereupon testified in substance that Wellman spoke with him of writing such letters, & witness said he wished him to do so,
170 making the letter strong, so that witness could use it with his sub-contractors, to make them increase their force.

Witness estimated that there were from 800 to 1,000 men at work when pl'ffs stopped work, with a sufficient complement of teams, and some $11,000 of supplies, which were fed out to the men while they were idle, except some removed by def't, as elsewhere shown.

That witness, according to custom as to monthly estimates, came to Chicago about Nov. 8 to get money on the estimates for October work, and did not afterwards return to the line; that Phillips, president of def't co., had then gone to Boston to get money, and telegraphed that he would be at home at a certain time, say Nov. 14th; that Phillips came with the news that he did not get the money & that the Boston fire had prevented his getting it; that the Friday before the fire arrangements had been made with a gentleman in N.Y. to place to def't's credit $1,000,000 the next Monday, but that when Phillips went to N. Y. to

get the money, the fire happening meanwhile, the gentleman who was to deposit the money declined to do so, saying he did not know what effect the fire might have upon the financial world. Witness continued to call upon Phillips afterwards to learn of success in nego-
171 tiating money, Phillips requesting witness to have courage, as there would be good tidings, which were expected almost daily, and so matters continued until Phillips, with Reed, attorney of Wisconsin Central R. R., went East, a little before Dec. 14, 1872.

That pl'ffs' men, about the time of stopping work, became unruly, defendant having had a force of men to follow up after plaintiffs' to gravel the track, and having paid out to its (defendant's) men, about Nov. 15th, some $12,000, and plaintiffs' men learning this, got the idea that def't was all right and that pl'ffs' were not so; the pl'ffs not having paid their men because def't did not pay pl'ffs'; that before Phillips & Reed went to N. Y., as last stated, they asked witness to hold their men and keep them quiet, and offered witness some Portage Co. bonds to keep them quiet, it being feared that they would tear up the track and burn bridges; that Phillips remarked that he believed def't was ruined, and did not know whether def't could get a dollar to go on with the work; that this was all in consequence of the Boston fire, and he regretted that he had not stopped the work in Sept. or Oct.

Def't paid in Nov. a draft for $3,453.75, drawn in favor of Chicago & Northwestern R.R. Co., on account of transportation of men for pl'ffs.

When pl'ffs, by their counsel, proposed to interrogate this wit-
172 ness and others, as hereinafter shown, as to several matters, to wit, the cost of transporting men to the line of the work to carry on the work; the cost of erecting buildings & supplying tents along the line to facilitate or be used in connection with the work; the cost of a supply road; the value of supplies, stock, tools and implements of plaintiffs, gathered by them in this work; and of certain 70 barrels of cement; and of certain ties claimed not to have been estimated; defendant, by its counsel, as each item of such testimony was proposed, objected thereto, insisting that the defendant was not to be charged in respect to such matters severally and respectively, but the court overruled the objection, and, notwithstanding the same, decided to admit the testimony, subject to be rejected by the court in charging the jury if on the whole case found to be immaterial or irrelevant; and defendant, by its counsel, then and there excepted to the decision of the court admitting such testimony; which, as given by this witness, tended to show that the cost to plaintiffs of transporting men to the work from July 18, 1872, to the close of their work, was between $4,000 & $5,000; that their tents on the line, from 40 to 60, were of the value of some $3,000; that there were between the same sections 10 log houses or wooden buildings, worth about $200 each; that pl'ffs built a supply road from 40 to 76 at a cost of over $5,300, which road was for the pur-
173 pose of hauling in supplies; & the testimony tended to show that stock, buildings, & supply road became of no value to the plaintiffs after the discontinuance of the work; also, that there was a depreciation of $3,252 on horses, mules, wagons, and harness, without including supplies, by reason of the discontinuance of the work; that 70 bbls. cement taken by pl'ffs to the work above section 40 had not been included in the estimates; that it was taken there to do certain masonry which def't, as this testimony tended to show, had contemplated having done, but after said cement was brought on the line concluded not to have done, using woodwork instead, and this cement cost pl'ffs $262.50 on the line, & was thereby lost to the plaintiffs; and that there were

certain ties, to the amount of some $2,100, which witness claimed should have been included in the estimates for Oct. or Nov.

The cross-examination of this witness (with other evidence) tended to show that said witness bought out the interest of Boyle in the contracts of Sept. 7, 1871, & Jan. 25, 1872, on the 24th of June, 1872, and on the 17th of Oct. 1872, bought the interest of Hopper in all of the aforesaid contracts, and in the property and tools of plaintiffs collected to carry on the contracts; after which last-named time said Hopper had no interest, while said Alexander had a half-interest in said contracts and property. Plaintiffs did not put many men on the work in Nov., 1872; perhaps, not any after Nov. 15th—first 40 miles of the road
174 not completed Sept. 1, 1872; next 20 miles, and thence on, never completed. Plaintiffs did not have men enough or teams enough on the line to complete the whole work in contract time.

Engineer Wellman's letters, of Aug. 5, 1872, Aug. 19, 1872, & Aug. 24, 1872, were received by plaintiffs, and were read, as follows:

Copy.] STEVENS POINT, *Aug. 5th*, '72.

M. T. SEYMOUR & Co.

GENTLEMEN: In accordance with the provisions of the 5th section of the supplementary contract entered into by yourselves & the P. & C. Cons. Co. recently, I hereby give notice that it is estimated, that in order to complete the first 40 sections of your contract within the time specified you will need to increase your effective force of shovelers to 412 and of teams to 37, to be available for moving earth alone, from and after the 10th of the present month; that is, you will need every working-day after the 10th, men sufficient to move 3,296 yards, each moving 8 yards, & teams sufficient to move in the whole time 16,222 yards.

Teams and men required for building & moving camps, getting up supplies, clearing, grubbing, corduroying, &c., will be in addition to the force named above.

Very respectfully,
(Signed) D. W. WELLMAN, *Ch'f Eng.*

175 Copy.] STEVENS POINT, *Aug. 19th*, 1872.

M. T. SEYMOUR & Co.:

GENTS: It appears from the estimates that on the first of the present month there was to be done on section 41 to 60, inclusive, about 141,800 c. y. This on the supposition that the original quantity estimated is reduced one-third, the most that can be safely calculated on.

The contract specifies that this work shall be done by Sept. 15th, 1872. You claim that the time intended to be named was Oct. 15, 1872.

Taking this last view, and allowing that 2,000 y'ds is moved in the month of Aug., (more than can be done by the present force,) you will require an average of not less than 578 shovelers from and after the 1st day of Sept.

Very truly yours,
(Sig'd) D. W. WELLMAN, *Ch'f Eng.*

Copy.] STEVENS POINT, *Aug.* 24, 1872.

M. T. SEYMOUR & Co.

GENTLEMEN: On the 19th inst. you were notified that according to our estimates you would be required, from & after Sept. 1st, to have at work on sec's 40 to 60, inclusive, 578 shovelers, with necessary teams,

in order to complete the work by Oct. 15, which is 30 days
176 after contract time.

As yet no material increase of force has been made, and as there is not a moment to be lost, notice is hereby given that if within ten (10) days from this date the requisite force is not on the work, or there are not unmistakeable indications that it will be on in time, this company will be obliged to avail themselves of the provisions of the 5th section of the supplementary contract dated July 18, 1872, to take steps to supply the deficiency and charge the cost of the same, whatever it may be, to you.

Very respectfully yours,
(Signed) D. W. WELLMAN, *Ch'f Eng.*

It appeared that plaintiffs' own force was all below sec. 40 until after Sept. 15, 1872; that prior thereto Fitzgerald & Bro., sub-contractors, were working between sec. 40 & sec. 60; force not known to witness, but there were not 578 shovelers at work on sec. 40 to 60, inclusive, prior to Oct. 15, 1872.

Witness received at Fifth Ave. Hotel, N. Y., a telegram from E. B. Phillips, president of defendant company, dated Sept. 9, 1872, as follows:

"I go up line Tuesday; return Saturday morning. Why have you stopped sending men?"

To which telegram witness (Alexander) replied: "I supposed men were going forward. Leave for home this morning."

177 Witness did not get back to the line of the work until about the last of Sept., 1872, and during his absence the line had been completed to sec. 40. Could not say that there were more than 207 shovelers on the work Sept'r 28th. Thought plaintiffs' pay-roll would show in Sept. altogether a force of 500 names or thereabouts. Principal part of supplies—which consisted of beef, pork, sugar, coffee, tea, &c.—were consumed by Dec. 1st or 2nd. None were sent up in Dec. Def't requested plaintiffs to keep on doing work after Nov. 15th, and made no objection then to plaintiffs' failure to complete the first 80 miles of road according to contract. Never asked pl'ffs to consider the contract abandoned, nor said that def't did not intend to go on with the work, or would not receive any work from pl'ffs, nor that in future def't did not expect to be able to make any payments, Phillips going to Boston before Dec. 20th while plaintiffs' men were in meeting, detaining plaintiffs' bookkeeper and threatening to hang him, seemed to be expecting money, but expressed some fear that he would not get it, & yet requested that plaintiffs should hold the men. Plaintiffs did not pay their laborers for work done in Oct. & Nov.; could have gone on with the work without any trouble, but did not feel inclined to do so until paid. Had def't paid plaintiffs would not have objected to going forward; at least witness thinks that plaintiffs would not have placed any other
178 obstruction in the way. Def't at no time told plaintiffs to stop.

Co-partnership articles between witness & Seymour, Rutter & Hopper, were never signed, & were never asked for by defendant.

Witness thought that without unreasonable trouble or expense a sufficient supply of teams and men to complete the entire work prior to Oct., 1873, could have been obtained if def't had paid estimates.

The testimony of this witness, and also that of Joseph O. Rutter, one of the plaintiffs, referred to certain interviews between them in behalf of the plaintiffs and E. B. Phillips & George Reed on the part of the defendant on the return of said Phillips & Reed from Boston to Chicago,

about Dec. 14th to Dec. 17, 1872, with about $150,000 money said to have been raised by Phillips from personal friends, and such testimony tended to show that Phillips wanted to know how little money plaintiffs could get along with, & Alexander said they could get along with $75,000 on a pinch, & Phillips said he could not let them have more than $40,000, if so much, & that only if they would go to Stevens' Point, & there receive the money in installments, & pay it out to the men, which plaintiffs declined to assent to, not agreeing to bind themselves to make such an application of the money. But Alexander
179 & Rutter proposed at the time that if defendant would pay $60,000, or, as they said, half of what defendant owed them, plaintiffs would give time for the residue, if secured, & give bond in $500,000 to go on with the work & pay off the liabilities to their laborers, contractors, & sub-contractors. Phillips proposed to turn out first-mortgage bonds of Wisconsin Central R. R. Co. at 75 c. on the dollar, to raise by hypothecation means to pay off all the laborers, & also to give $40,000 of Portage Co. bonds for doing it, & Alexander & Rutter declined to try to negotiate the bonds, as defendant had been unable to negotiate them, and plaintiffs declined to pay the men from their own resources, as Rutter said he thought they might do, so declining, however, because, as he said, they did not propose to build the railroad at their own expense, & out of their own pockets, & said Rutter not being willing to involve himself personally, nor to guarantee to prosecute the work until plaintiffs had a positive settlement in regard to the amount then due them.

The testimony of said Rutter further tended to show that plaintiffs would not agree to prosecute the work further until settled with for what had been done; that in one of these interviews he & Alexander demanded of Phillips the estimates which witness understood had not come into the hands of plaintiffs, though prepared & sent for de-
180 livery to them, & Phillips declined to give them up, or give any information on the subject. Also, that plaintiffs in this interview demanded the 15 % reserve, on the ground that plaintiffs would have been at section 60 had the moneys due them been paid, & Phillips conceded that he would allow the $15,000 in settlement as being due as a matter of right on that ground; that this interview was in the afternoon of the day that Phillips went to Stevens Point with this money to be paid out to the men; Phillips stating that if plaintiffs did not take the money for that purpose, some one would go up there & pay it out, & witness Rutter urging that if Phillips took the responsibility of paying plaintiffs' liabilities he must do so at his peril; that Phillips did not concede that the work would have been done within contract time if plaintiffs had been paid.

The testimony of Job Voak, offered on the part of plaintiffs, tended to show that pl'ffs' work was entirely suspended Nov. 28, 1872, because the men had not been paid for their work, but that some clearers & choppers worked a few days in Dec.; that at the time of such suspension plaintiffs' men were grading from section 46 to section 53, there being some cuts between those sections not entirely taken out, and the track being laid over some cuts, and he estimated that over half the grading from section 40 to section 60 had been done. This witness was
181 asked to testify as to the supply road constructed by plaintiffs or their sub-contractors, and the purpose for which it was constructed; also, as to groceries, flour, pork, & other supplies which plaintiffs had on hand Nov. 28th, 1872, and as to live stock, wagons, or carts, harness, ox-teams, mules, tools, tents, and huts provided for carrying on

the work; and def't objected to any testimony being given as to such matters severally, as the same were respectively proposed; the def't, by its counsel, insisting that the def't was not to be charged in respect of such matters severally and respectively. But the court decided to admit this testimony, notwithstanding such objection; the court designing to exclude it from consideration in charging the jury, if upon the whole case it should appear that such testimony was immaterial or irrelevant, and def't then & there excepted to the decision of the court. And the testimony of the witness, coming in under and subject to such several objections & exceptions, tended to show that plaintiffs and sub-contractors made a supply road, mainly a new one, from section 40 to section 76 in September, October and November, 1872, completing it about November 1st, 1872; that plaintiffs had ten horses and mules and ten oxen, which with the wagons & harness were sold December 26th, 1872, under directions given by plaintiffs Dec. 20 to 25th, 1872; that in cer-

182 tain cars of Wisconsin Central R. R. Co. at section 46 were goods, supplies, tents, and tools of plaintiffs when the work was suspended, which with such cars were taken away by defendant March 6th, 1873, to Stevens' Point, the whole of such tools, lumber, cooking furniture, and other goods, amounting to $5,537.43, and being, with the exception of scattered tools, &c., (the amount of which was $2,016.50) in the cars so removed to Stevens' Point, besides $2,011.45 worth of goods in another of such cars.

That there were buildings and lumber on the line to be used as tents for the men, from section 46 to section 60, worth $680, and other lumber, which witness estimated at 3,079 feet, worth $22.50 to $25 per thousand.

The plaintiffs proposed to charge for the services of witness Voak in taking care of the aforesaid property of plaintiffs after the suspension of the work. Defendant objected to the giving of any testimony on the subject, insisting that defendant was not to be charged for the time or services of the witness; but the court overruled the objection, and decided that the testimony should be admitted, subject to be rejected by the court in charging the jury if upon the whole case it appeared immaterial or irrelevant; to which decision of the court defendant, by its counsel, then and there excepted.

And the witness thereupon testified that he had remained in the employment of defendants, in and about the taking care of said

183 property, at a salary of $150 per month and board, making a bill of $288.86.

The defendant objected in apt time to the testimony in regard to the bringing away of the cars by defendant from section 46, where they were standing, with plaintiffs' property, March 6th, 1873, to Stevens' Point, the defendant claiming that such removal of cars was not a ground for claim in this case, and also urging that it appeared that it was after the commencement of this suit. But the court decided that these objections were insufficient, and ruled that the testimony should be admitted, subject to be rejected by the court in charging the jury if on the whole case found to be immaterial or irrelevant; to which decision of the court defendant, by its counsel, then and there excepted.

The witness was also asked by plaintiffs' counsel to state what was the character of the season after July 18th, 1872, whether bad or otherwise, for the prosecution of the work.

Defendant, by its counsel, objected to the question, and to the testimony proposed to be drawn out thereby; but the court overruled the objection and decided to admit the testimony, and defendant, by its counsel, then and there objected to the decision of the court.

And the evidence given under and subject to such objection
184 and exception tended to show that up to the latter part of the time that plaintiffs were at work the season was very wet, so that it was almost impossible to work or haul to advantage, and witness estimated that the work could have been got along one-half faster if the weather had been good.

The defendant in apt time objected to the testimony as to the sale of stock made by plaintiffs after the suspension of the work, the testimony tending to show that the property sold for about what it was worth for other uses than to carry on this railroad work, but for less than the property would have cost to be replaced on the work. But the court overruled the objection and admitted the testimony, and defendant, by its counsel, then and there excepted to the decision of the court admitting such testimony.

That witness told defendant's agent, Rhodes, when he proposed to to take said cars, March, 6, 1873, not to meddle with the goods, and also declined to let defendant have the cars, and declined to take plaintiffs' property from the cars; and thereupon defendant, by its agent, took the cars with the goods therein to Stevens' Point. Evidence tended to show that the sheriff had taken under attachment, commenced by John Hayward against plaintiffs, some of the goods which were put from the cars into the warehouse at Stevens'
185 Point, as hereafter mentioned in the testimony of Rhodes.

Witness David W. Wellman, being asked by plaintiffs' counsel how long it would have taken the plaintiffs, in his opinion, at the time of the suspension of the work by the plaintiffs in November, 1872, or about the first of December in that year, with the force they had, to complete the road for the third twenty miles on to section 60, inclusive, defendant, by its counsel, objected to the question and to the testimony proposed to be called out by it; but the court overruled the objection, and defendant, by its counsel, then and there excepted to the decision of the court.

And under and subject to such objection and exception the witness testified that he supposed at that time that the road could be finished up to section 60 by January 1st, 1873.

This witness was also asked by plaintiffs' counsel as to the character of the weather during the summer and autumn of 1872, and as to how it affected the prosecution of the work; and defendant, by its counsel, objected to the question as irrelevant and to the proposed testimony as incompetent; but the court overruled the objection, and defendant, by its counsel, then and there excepted to the decision of the court.

Whereupon the witness, answering, testified that he thought
186 the weather delayed the work very considerably.

His testimony also tended to show that while his letter of August 21st, 1872, aforesaid was written in the discharge of his duty as engineer, yet it was anticipated by a conversation between him and Alexander, in which Alexander suggested, or, at least, consented to the sending of such letter; also that the letter was not written upon suggestion of Phillips; also that the letter of August 24th was written as a warning to plaintiffs to make effort to have the work finished; and that witness expected plaintiffs would put more on the work between section 40 and section 60 before finishing the road up to section 40; that witness verbally and constantly urged Alexander to increase his men and teams. The force was small compared with what it should have been—not half as large as it ought to have been to complete the work. The letter of August 24th was sent because there hadn't been

such increase of the force as was required by the previous letter. Plaintiffs could have worked with advantage with two or three times the force they had. None of the plaintiffs superintended the work but Alexander, save that Seymour did to some extent for a time.

187 The testimony of William Whitman, in behalf of plaintiffs, tended to show that he and his partner, Perkins, had a contract for the bridge work, and did it from Stevens' Point to section 66; that plaintiffs did not pay said Whitman & Perkins for work done in October, November, and December, and that on the 31st of December, 1872, defendant paid $4,990.60 to employés of said Whitman & Perkins for work done in and about the bridge contract of said Whitman & Perkins with plaintiffs, and that plaintiffs afterwards took credit for said amount in settlement with Whitman and Perkins.

In the course of the examination of the plaintiff Alexander, it was proposed by plaintiffs' counsel to prove by him that plaintiffs were entitled to charge a certain sum over and above and in addition to the estimates for the cost of handling the earth at certain points between section 40 and section 60, where the grounds were low and wet, and especially about section 42 and section 46, where it was thought the earth could not be handled with advantage by the use of teams, it being claimed that defendant about Oct. 6, 1873, consented to allow plaintiffs the use of a train to handle the earth and to pay the extra cost to plaintiffs of handling the earth by train.

188 Defendant, by its counsel, objected to any testimony on the subject, urging that if it was a matter of special contract, independent of the contracts declared on or outside the same, it was not proper to introduce it in this action, and also further urging it ought to have entered into the estimates if it was a proper matter of charge, and could not be introduced under these circumstances without having been passed upon by the engineer and embraced in estimates; but the court overruled each and every of the objections, and decided to admit the testimony, and defendant, by its counsel, then and there excepted to the decision of the court so admitting the same.

And the evidence of the witness tended to show that said Phillips passed over some of the ground in question with Alexander, and agreed with Alexander that earth should be taken out with a train provided defendant's engineer came to the conclusion that it should be so done, in which case the train was to be sent up; and that Phillips said that whatever the cost was he, meaning defendant, would pay the plaintiffs, it being understood that it would be more expensive to take out the cuts in that manner—that is, by use of a train. That the engineer, Wellman, soon thereafter went up the line, told the witness that Phillips had directed him to come and make such arrangements as he deemed

189 advisable to expedite the work at those cuts, and that Wellman then proposed to give plaintiffs all the waste, and borrow and furnish an extra train, but said that furnishing the extra train should be subject to Phillips' decision. That Wellman afterwards stated in telegram that taking those cuts out by train was the only way to do it, and that with the force then on the line the work could be completed to section 60 that year, and by doubling the force plaintiffs could complete to section 70. That the extra train was furnished by defendant on the evening of the same day of such conversation with Wellman, or the next morning, and was used in the work as proposed. That plaintiffs kept an account of the extra cost of taking out the earth in that way under said arrangement, and the extra amount beyond what it would have

cost to take it out by the ordinary method used on said line was $11,708. That Phillips when on the line, speaking about this mode of doing the work, had expressed an anxiety to have the work expedited; that some corduroy was saved to defendant by having the work done in this way. That at the time of the making of the estimates, after this verbal arrangement with Phillips, witness remarked to Wellman that Phillips had made such an arrangement, and that Wellman said he could not
190 allow the extra expense, for it was a matter between Alexander and Phillips, and must be settled between them; so this item was not embraced in any of the estimates.

John T. Quinn, sworn as a witness in behalf of the plaintiffs, was asked by their counsel to testify as to the value of the houses, tents, and lumber which had been spoken of by the witness Voak; as aforesaid, also as to ties and materials claimed not to have been included in the estimates, and certain houses on section 23, and as to labour on side-track on section 40, and certain freight claimed to have been paid by plaintiffs.

Defendant, by its counsel, objected to the proposed testimony as being incompetent, but the court overruled the objection, and defendant, by its counsel, then and there excepted to the decision of the court; under which witness gave his estimate as to the value of the lumber, tents, and log houses, being $1,603.88, and introduced an account of items, as follows, as being called out by the questions of plaintiffs' counsel:

Sept. 9.	To meals, Capt. Vocke	1 75
"	Feed of his horse sundry times	24 25
" 30.	Paid Phillips & Colby Company for transferring freight at Stevens' Point	6 00
	To amount of labour on side-track, sec. 40—45 labourers at $2.25, and three foremen at $2.50	169 35
191 Oct.	Two days' teaming, moving Johnson	9 00
	Paid for freight, Stevens' Point to different places on the road	160 32
	Houses on sec. 23	360 00
	Torch for engine	5 00
	Day's team work	4 50
	Vouchers—Chase—for ties	2,167 25
	Whitman & Perkins, materials delivered on the ground	514 27
	Total	3,367 69

As to ties embraced in this account—the court admitting the witness further to testify, notwithstanding such objection, and the defendant, by its counsel, then and there excepting to the decision of the court—the witness said that Hopper, Boyle & Co., who had the contracts of September 7th, 1871, and January 25th, 1872, aforesaid, were to deliver a certain number of ties to defendant, which they did not deliver, and plaintiffs in order to fill the contract procured the ties from Chase in October and November, 1872, and these were referred to in a certain voucher attached to the November estimate, which voucher was signed "D. W. Wellman, W. A. K.," meaning W. A. Kerwin, who was clerking for said Wellman, which ties were for the line below section 40, and not included in the estimates.

Sundry witnesses were called & examined on the part of the defendant, among whom were G. S. Rhodes, Henry Pratt, E. Bacon, John F. Quinn, Geo. Reed, Cha's L. Colby, E. B. Phillips, & S. F. Folsom.

192 And the testimony of said G. S. Rhodes tended to show that as

to certain eight cars of the Wisconsin Central Railroad Company at section 46, the same referred to by the witness Voak, that said Rhodes went up the line to bring them away, and Voak, acting for plaintiffs, would not consent to have plaintiffs' goods taken out of the cars, and thereupon witness brought the cars with such goods to Stevens' Point, and put the goods in the warehouse of McConnell & Burr, at Stevens' Point, and that a part of such goods were yet in the warehouse, and a part were taken by the sheriff of Portage County. Witness asked Voak to remove the goods from the cars, and Voak refused to do so.

Said Henry Pratt's testimony tended to show that Phillips, for defendant, was about making payment of certain moneys to plaintiff Alexander under the contracts in question, on or about October 15th, 1872, and called witness into the room in which Alexander and Phillips were, and in the presence of witness told Alexander that the payment on account of the work north of the first forty miles was under protest, defendant reserving its rights under the contracts. At this time the balance due plaintiffs for work from sections 1 to 40 inclusive was paid, except some Portage County bonds, which were afterwards delivered as payment for work above section 40.

193 The following receipt was read in evidence on the part of the defendant:

"CHICAGO, *July 18th*, 1872.

"Received of the Phillips & Colby Construction Company one dollar, in fulfil'ment of every claim of every kind and nature, including work done or for extra work, or any dimination of quantities or other matters growing out of contracts made by us with said Phillips & Colby Construction Company, September 7th, 1871, and January 25th, 1872, and which are this day transferred to M. T. Seymour, J. O. Rutter, and A. J. Hopper, under the firm-name of M. T. Seymour & Co.

(Signed) "A. J. HOPPER.
"H. S. BOYLE.
"Per M. T. SEYMOUR.
"M. T. SEYMOUR.

"Signed in the presence of—
"CHAUNCEY KEEP."

Also another paper, as follows:

"In consideration of one dollar to each of the undersigned in hand paid by M. T. Seymour, E. S. Alexander, J. O. Rutter, and A. J. Hopper, the receipt whereof is hereby confessed and acknowledged, and in further consideration of the agreement this day made by and between them and the Phillips & Colby Construction Company for the completion of the work mentioned in the within contract, we have agreed to assign and transfer, and do hereby assign and transfer, unto them all our

194 right, title, and interest in and to said contract and all claims thereunder, subject to the performance by them of all the covenants and conditions thereof on their part therein contained, as the same have been modified and changed by their said agreement with said Phillips & Colby Construction Company.

"In witness whereof we have set our hands and seals this 18th day of January, 1872.

"A. J. HOPPER. [SEAL.]
"H. S. BOYLE,
"Per M. T. SEYMOUR. [SEAL.]
"M. T. SEYMOUR. [SEAL.]

"Signed in presence of—
"CHAUNCEY KEEP."

A like document, signed in the same way as the last, was endorsed on each of the contracts of January 25th, 1872, and September 7th, 1871.

Further testimony of David W. Wellman tended to show that between section 40 and 60, 50 to 75 per cent. of the work required by the contracts in question had been done, and that between section 60 and section 80 over ten per cent. of the work had been done, and that between sections 80 and 100 perhaps ten per cent. had been done.

And the testimony of said E. Bacon tended to show that certain pay-rolls of the laborers of plaintiffs on the line in question, produced and exhibited before the jury, were made up by Quinn, the book-keeper
195 of plaintiffs, and duly certified to be correct. That Quinn was present when each man's name on the rolls was called, and the moneys due the men paid by defendant so far as the men presented themselves, and receipted on the rolls, to defendant; the laborers being brought down from off the line to Stevens' Point, transportation to them for this purpose being furnished by defendant, and the moneys being paid them by defendant at Stevens' Point about Dec. 19, 1872. That Bacon went up & acted as paymaster for defendant after the aforesaid conversation in which Alexander & Rutter declined to agree to receive $40,000 to be paid out to the men, and the amount so paid by defendant on these rolls was $26,869.00, including $5,927.98 board-bills for which plaintiffs had become responsible to the boarding-bosses, & which were deducted from the men's wages. Quinn's evidence tended to show that after November 28th, 1872, the men remained on the line about section 46 three weeks and a day, not working, but in a state of insubordination, having torn up four or five rails and taken forcible possession of witness, holding Quinn in custody, with some thirty cars, the facts of which he communicated to plaintiff Alexander. That there was then due these men $43,000 to $44,000. That said payment by defendant to the men was about December 19th to 20th, 1872, and Quinn, the book-
196 keeper, noted it on plaintiffs' books.

Other evidence showed that the cost of the supply-road, commencing at section 30 and running to section 75, was $5,380.29, a part of which, to wit, $1,292.94, was paid for by sub-contractors.

That plaintiffs' books were taken from section 46 to Stevens' Point when those rolls were paid. Quinn declined to turn the books over to defendant's agent, and declined to let him see them; had then and has still plaintiffs' books in his possession, and made a memorandum therein of these payments by defendant.

Certain telegrams from the plaintiff Alexander were read in evidence, as follows:

"CHICAGO, *November* 19, 1872.

"JOHN F. QUINN,

"*End of track, Wisconsin Central R. R., (via Neenah, Wis.)*

"Let Folsom and McConnell travel. In no case make an estimate for them until their men are paid. Employ their men if they will go down the line. No news from the East.

"E. S. ALEXANDER."

"CHICAGO, *November* 28, 1872.

"L. MONTGOMERY,

"*End of track, Wisconsin Central R. R., (via Neenah.)*

"Tell Vock not to employ a striker, nor to give them their time. Let them see their mistake. I consider the company perfectly sol-

197 vent, and will be in funds in a few days. Tell Wash and Archie to stand firm, and let those leave who desire. Don't render estimate to any contractor.

"E. S. ALEXANDER."

"CHICAGO, *December* 18, 1872.

"JOHN F. QUINN,

"*End of track, Wisconsin Central R. R., (via Neenah.)*

"I can't meet you at the Point to-morrow. You will carry out my orders by using your own judgment. Keep me advised.

"E. S. ALEXANDER."

And the testimony of said George Reed tended to show that it had been estimated that about $100,000 of supplies would be needed by plaintiffs for carrying on the work during the winter of 1872–'3, as was talked of in a conversation between witness and Alexander about October 2nd, 1872, and that Alexander signified that plaintiffs might desire to ask the assistance of defendant to the amount of about $50,000 for laying in such supplies, when Alexander said to Phillips, "Well, I suppose you will be ready when the pay-day comes round to pay the estimates;" & witness said to Alexander that he couldn't claim that there was anything due on the contract; but if defendant paid he would do so under protest, reserving defendant's legal rights; and Alexander assented, saying that they, plaintiffs, were all right;
198 thought they would be all right in the end.

That witness returned from Boston with Phillips to Chicago about December 13th or 14th, 1872, and for two or three days thereafter had frequent conversations with Alexander as to the situation of affairs, witness stating that defendant would probably pay plaintiffs $40,000, but that to relieve the situation on the work the money should be paid to the men, so that the work might go on, by plaintiffs or defendant, as should be determined between them; and witness suggested to Alexander that he and witness should go up with Phillips and arrange for paying off the men; that an estimate should be made for the work done, so that the parties could arrange the matter, though witness knew nothing as to whether plaintiffs were to go on with the work or to have notice to quit.

That Alexander protested against having the men paid by defendant, or under its supervision, and insisted that the money should be paid in Chicago, and that Alexander should have $75,000 before he would talk about going up on the road; and witness proposed that defendant should advance $40,000 and secure the balance by paper on four months' time, with first-mortgage bonds as collateral.

No arrangement being consummated, Phillips and witness went
199 up on the line for the purpose of paying off the men, as they had suggested to Alexander, it having been proposed that Alexander should himself go up to Stevens' Point for that purpose, and there receive the $40,000.

That the defendant took the contract to build the road; that the railroad company placed its resources at the command of defendant, the residue of which resources of the road defendant was to turn over with the road on completing the road.

That at the time of the conversation in October, 1872, plaintiffs were using considerable vigour in prosecuting the work, and witness commended Alexander for what he seemed to be doing; that the proposition of Alexander to give a bond for $500,000, as he had said, was not made

by Alexander in a business way, as witness understood, but was in a crowd gathered by the loud talk of Alexander, at the railroad depot, when Phillips and witness were starting up to Stevens' Point to have the men paid, as aforesaid.

On this trip East there was raised by Phillips about $150,000, and the money was mainly paid out to laborers on the line, including immediate employés of defendant, the defendant at the time being engaged in building the north end of the line, near Lake Superior, which was not included in the contracts with the plaintiffs.

200 That Alexander, in interviews about December 14th to 17th, 1872, claimed about $120,000, but Phillips did not admit any such amount as being due. Witness asked Alexander whether plaintiffs were going on with the work, and could get no definite answer, though the understanding was that plaintiffs were going on. Witness told Alexander that defendant would do anything and everything that was reasonable for the prosecution of the work, and give securities if plaintiffs wanted them to protect them.

And the testimony of said Charles L. Colby tended to show that he was a stockholder and director in defendant company. Was in Germany in October and November, 1872. That defendant was then entitled to $1,631,250 $ of first-mortgage bonds of the Wisconsin Central Railroad Company, which were in the hands of Gardner Colby, of Boston, as trustee for defendant, the market value of which bonds was ninety cents on a dollar, and that defendant had $240,000 in town and county subsidy bonds of municipalties in Wisconsin, worth eighty-five cents on the dollar. Defendant was then operating the railroad so far as complete, and witness was abroad to negotiate the bonds of the railroad company.

201 Defendant's counsel asked witness to state what arrangements he had made in regard to negotiating defendant's securities immediately prior to the Boston fire of November 9th and 10th, 1872.

Plaintiffs' counsel objected to the question, and the court sustained the objection, refusing to allow the testimony to be given; and defendant, by its counsel, then and there excepted to the decision of the court.

Defendant, by its counsel, asked the witness to state whether the defendant had money enough to meet its liabilities as they matured from time to time, and plaintiffs, by their counsel, objected to the question, and the court sustained the objection; and defendant, by its counsel, then and there excepted to the decision of the court.

Defendant, by its counsel, asked witness to state whether at any time after November 1st, 1872, prior to the institution of this suit, defendant had funds to meet its outstanding liabilities as they matured from time to time.

Plaintiffs counsel objected to the question, and the court sustained the objection, ruling that it made no difference how much funds defendant had, for the question was whether defendant paid or not. Defendant,

202–3 by its counsel, then and there excepted to the decision of the court denying the right of defendant to give any testimony as to the ready means of defendant between November 1st, 1872, and the commencement of the suit. The first-mortgage bonds were issued at the rate of $25,000 per mile of completed road.

And the testimony of said E. B. Phillips, president of defendant company, tended to shew that there had been no arrangement, written or verbal, to extend the time for completing the work under the contract of July 18th, 1872; that as to what Alexander had testified as aforesaid about excavation by train, the fact was that in a conversation between

witness & Alexander, early in Oct., Alexander claimed that he should be allowed to waste and borrow, and that witness said he would have Wellman, the engineer, go up there & make an arrangement with Alexander; and witness left it entirely in Wellman's hands to make the arrangement, and never promised to pay Alexander the cost of the work. That the additional train was furnished that the work could be done, and defendant made no charge for it; that on making payment to plaintiffs in Oct., 1872, witness told Alexander that the payment was under protest, reserving defendant's rights under the contract, and that defendant was not satisfied with the progress of the work. Pl'ffs' counsel admitted said Phillips to be of sufficient experience to be an expert in judgment as to the value of the use of the road. His testimony
204 tended to show that in his opinion pl'ffs' failure to complete the road to sec. 40 by Sept. 1st, 1872, & from sec. 40 to sec. 60 by Sept. 15th, 1872, & from sec. 60 to sec. 80 by Nov. 15th, 1872, was a damage to def't; that the business which would have been anticipated for the road would have come principally from the manufacture of lumber, and if the road had been completed to sec. 100 there would have been a large amount of lumber saved in the spring of the present year; that the earnings would have been small between Nov., 1872, & Feb'y, 1873, though witness estimated that the use of the road from Nov. 15th, 1872, to Feb'y 17th, 1873, for 100 miles from Stevens' Point, would have been $20,000.

It appeared from his testimony on cross-ex'n, among other things, that his aforesaid protest to Alexander was made when the final payment for work up to sec. 40 was made, before the check was passed; that Alexander made no reply, but rather laughed about it, and asked what witness meant, or something of that kind; and witness thought the matter did not make any deep impression on Alexander's mind at the time; yet it was not a joke on the part of the witness. Witness did not tell Alexander that defendant would terminate the contract.

Witness's estimate of the earnings of the first hundred miles of road, from November 15th to February 17th, was estimated as prob-
205 able earnings. The country was a wilderness, without settlements between 40 and 100. Lands along there were granted chiefly for the building of the road, and were unoccupied lands; witness understood it to be a timbered country, but didn't know of any trade or traffic there.

That witness did not promise that defendant would pay the cost of doing the work by train, but left it to Wellman to go up and make arrangements with Alexander as to the mode of doing the work. It was difficult but not impossible to do the work with teams; for the contract, as the cheaper way to expedite the work, was to use the engine, but not more expensive to them, if defendant furnished the train, as it did; not more expensive to the contractors when they got the waste and borrow both ways.

In answer to questions by the court, the witness said that practically there was no business on the line of this road from section 40 to section 80, except what might be created by persons going in there after the completion of the line, and establishing saw-mills and cutting logs, there being no mills there and no logs cut or waiting to be transferred above where the track was to be laid; that there were logs in the streams above section 46 to be sawed. There was no business of any consequence until the railroad went there.

206 Further evidence of said Wellman tended to show that the work of plaintiffs in making use of the train as aforesaid, so

furnished by defendant to plaintiffs, was done in October, 1872, and upon cuts along about section 45 and section 46. That witness estimated on the work that was done by train, that is, included in the estimates introduced in evidence as aforesaid, the excavation made by train as well as excavation made otherwise, such being the case also in the estimates for November and December work; it having been witness' design to estimate all the work of all kinds. That witness ordered no cement upon the work; did not remember that there had been any claim made to him for cement; that there had been no use for cement north of section 40. The instructions were that no masonry would be put in above section 40 without further direction, and hence there was no use for cement.

No work was done between sections 60 and 85 after November 15th, the witness thought. All the work done by train witness estimated for at the contract price, and not for any extra cost to the contractors, if there was any.

And the testimony of said S. F. Folsom, given on the part of defendant, tended to show that certain notices of lien, which had been
207 given by employés of Folsom & McConnell, were correct as to the amounts claimed by laborers on this road under said Folsom and McConnell, sub-contractors; and also that the pay-rolls on which such men receipted to defendant in or about Dec. 1872, and which were read in evidence on the part of the defendant were correct, and that the amounts specified in such pay-rolls were due the men for labor on this work, the amount being $6,215.13.

The testimony of E. S. Alexander, on being recalled on the part of the plaintiffs, tended to show that what he said in the aforesaid telegram of November 28th, 1872, as to the financial condition of defendant was based upon conversation which he had had with Phillips, in which Phillips had expressed the hope and assurance of getting money, and promised funds to pay the estimates.

That witness did have some conversation with Phillips and Reed as to winter supplies, but there was at the time of the conversation four months' further time for putting them in, and witness had Wellman make an estimate about November 1st, 1873, as to what supplies would be required—an estimate for the entire work to complete the balance of the road—and plaintiffs were able to furnish the supplies. Witness denied that anything passed between him and said George Reed, as to defendant paying moneys to plaintiffs under protest, & testified
208 that when Phillips handed witness the check, as Pratt came into the room, Phillips said to witness, "I give you this under protest," with a smile, and witness took it as but a joke; thought he asked Phillips why, and Phillips replied, "nothing," or something of that kind.

The witness further testified that defendant only had iron for the road to section 65, and that it was a matter of talk between Wellman and witness, also with Phillips, that if plaintiffs got to section 70 in 1872 it would be all that defendant was making calculation for.

The testimony of said David W. Wellman, tended to shew that he had no data from which to make an estimate of the actual expense of doing the work by train.

Further evidence of said E. B. Phillips tended to show that defendant had had on the line all the season and at this time had certainly 500 men at work; that there had always been a chief engineer of the Wisconsin Central R. R. Co.; that in a conversation which witness had with Alexander, inquiry being made as to whether plaintiffs would go

on with the work, or wished to do so, when defendant was prepared to pay, Alexander answered that he thought not without some new arrangement.

209 And the witness testified that he never notified plaintiffs that the work had been abandoned, but notified them to the contrary. That defendant continued having work done on the road during the winter of 1872 and 1873, and was yet continuing work; suspending the grading after November; having ties got out between section 40 and section 60, and also having a large force of men on the northern end of the road. It would have been inconvenient for defendant to take the money up to where the men were, to pay it out to them; it was more convenient to make the payment at Stevens' Point.

The foregoing is the substance of the testimony so far as it bears upon or is connected with the several exceptions by the defendant.

The court ruled that the testimony aforesaid, as to money being paid plaintiffs under protest, was immaterial; that the conversation testified to by Phillips and Pratt in that regard, as aforesaid, was not to be regarded as a protest of any avail to defendant, nor as tending to constitute any defence; and defendant, by its counsel, then and there excepted to the decision of the court thus excluding such testimony.

And defendant prayed that certain instructions should be given to the jury, as follows:

210 1. The declaration in this case is upon a special contract, by which the plaintiffs covenanted to build and complete certain sections of the Wisconsin Central Railroad by certain specified times, and the defendant agreed on its part, in consideration of the fulfil'ment and performance of all the stipulations to be performed by the plaintiffs, and of the full completion of the work & the receipt of the engineer's certificate of such completion, to pay estimates for the work as returned by them in that manner. In such a contract time is of the essence, and in a suit on the contract a failure of the plaintiffs to finish the different sections of road by the time agreed is fatal to a recovery by the pl'ffs; so the court charges you that if on November 15th, 1872, the plaintiffs had not completed the sections of road from 1 to 80, according to the contract, your verdict must be for the defendant.

2. That if the jury believe from the evidence that the estimates for September payable on or about October 15, 1872, were paid by the defendant, under protest, objecting that the plaintiffs were not duly complying with their contracts, such payment would not be any waiver of the right of defendant to insist upon having the work done within the stipulated times as a condition precedent to the payment therefor.

211 3. The court charges the jury, as matter of law, that under the contracts no estimate is a final estimate unless it is accompanied with a certificate of the chief engineer that the work therein specified has been fully completed according to the contract; and if plaintiffs have introduced in evidence and relied on monthly current estimates for the months of October, November, & December, 1872, made by the chief engineer, without such a certificate as to final completion, such evidence is conclusive, as against the plaintiffs, that the contract sued on was still subsisting at the date of the last estimate.

4. If the jury find from the evidence that after the 15th day of November, 1872, the plaintiffs acquiesced in the non-payment of the estimates ordinarily payable on or about that date, and, notwithstanding such non-payment, proceeded with the work on the railroad as before, that was a waiver on their part of any such default by defendant; and after said date pl'ffs had no right, without some fresh default on the

part of defendant, to voluntarily abandon the work and claim any damages unless for actual work done.

5. If the jury believe from the evidence that the first default was on the part of the plaintiffs, and that after the defendant failed to
212 pay the estimates for the October work due on or about Nov. 15, 1872, that plaintiffs acquiesced in the excuse or reason, if any, given by the defendant for the non-payment thereof, and did not give notice or permission to the defendant to take charge of the supply-road or other things now sought to be charged for by the plaintiffs as having been prepared by them in order to complete the work, the plaintiffs should not be allowed any compensation for such supply-road, houses, or other things, except so far as the same may have been included in the estimates.

6. That by the terms of the contracts in evidence, any work done by the plaintiffs was to be estimated by the chief engineer of the Wisconsin Central Railroad, and said engineer was made an umpire to decide all matters arising or growing out of the contracts; and the plaintiffs are, as to work done by them and materials for the same provided, limited to the amounts estimated and stated in his estimates by such engineer, which estimates have been received in evidence; and defendant was under no obligation to pay for any work not included in such estimates.

7. That, by the contract between the parties, the defendant had the right to retain fifteen per centum of each and every monthly estimate; and it was provided that the sum of $15,000, which was payable
213 by defendant on the completion of the first sixty miles, should, with this percentage of reservation on all the work beyond the first forty miles, be left in the hands of defendant, and held by it, the defendant, as security for the performance of the contract by the plaintiffs as to the whole work from section 40 to the end of the line covered by the contracts, and to be forfeited to the defendant and applied towards the payment of any claims for damage on failure by the plaintiffs to have the work of the construction of the road completed in the time stipulated; and the court instructs the jury that the evidence does not warrant the recovery of these moneys by the plaintiffs in this action.

8. The sum of $15,000, payable partly in Portage County lands, was payable by defendant on the completion of the first sixty miles of the road, if done according to the contract and on the certificate of the chief engineer; but as this part of the road has not been completed, and no certificate of the chief engineer furnished, & the contract-time for the completion thereof was on or before September 15, 1872, the plaintiffs are not entitled to recover said $15,000, or any part thereof, if the jury believe from the evidence that they were guilty of the first default.

214 9. The sum of $15,000 was payable by defendant on the completion of the first 60 miles of road, if done according to contract; but as this part of the road has not been completed, and the contract-time for completion thereof was on or before Sept. 15, 1872, plaintiffs are not entitled to recover said $15,000, or any part thereof, if the jury believe from the evidence that they were guilty of the first default, and that their only excuse for the non-completion of the third section of 20 miles of road is the non-payment of the money for work done in October & November.

10. If the jury believe, from the evidence, that the defendant kept & performed its covenants and agreements up to the 15th day of November, A. D. 1872, and paid all moneys due from it to the plaintiffs upon estimates payable prior to said time, and that on said day said defend-

ant was in no default; and that said plaintiffs were, on said 15th day of November, in default as to the performance of the agreement on their part in not having 80 miles of the road completed, and in disobeying orders of the engineer to furnish an adequate force to complete the different sections of the road; and if the jury further believe,
215 from the evidence, that the plaintiffs permitted the work to be suspended about the last day of said month, and that the reason of such suspension by the plaintiffs was merely the fact of the non-payment of the estimates payable on or about Nov. 15th, A. D. 1872, this was not such a prevention by defendant or hindrance to the plaintiffs as would permit the plaintiffs to charge the defendant for the supply-road, houses, or cost of preparation below section 80, which should have been completed and built by that day.

11. The jury are instructed that there can be no recovery against the defendant for the amount or value of any goods brought down upon the line of railroad to Stevens' Point after the beginning of this suit, whoever ordered it, because whatever may be the liability of the defendant for such act in another form of action, such matters form no element of damages for breach of covenant in this action.

12. The claim of plaintiffs for 70 barrels of cement should not be allowed to them, for it was proper that the same should go into the estimates; it was plaintiffs' duty to bring the matter to the attention of the engineer, who had full power to pass upon the claim, & if the plaintiffs failed to call upon the engineer to make such estimate, or if they called upon him and he declined to allow for the cement, in either case the plaintiffs are not entitled to recover for such cement.

216 13. The defendant is entitled to have set off to it or deducted from the estimates such sum as the jury may find from the testimony to be due the defendant for damages for delay of plaintiffs in not completing the third section of twenty miles of the road on or before the 15th day of Sept., A. D. 1872; the fourth section of twenty miles on or before the 15th day of November, A. D. 1872; and the fifth section of twenty miles on or before the 15th day of December, A. D. 1872, such damages to be based on a fair value of the use of such completed sections of railroad from the respective dates of completion according to the contract down to the institution of this suit.

The court declined to allow in terms any of such prayers, and refused the same severally and respectively; and the defendant by its counsel then and there excepted to the decision of the court so refusing to allow such prayers severally and respectively.

The court in charging the jury decided to allow to stand the aforesaid testimony as to the cost of transporting men to the work, the cost of erecting houses, sheds, shanties, stables, & shops along the line of the work so far as necessary for the accommodation of the men and the prosecution of the work, the cost of the supply-road beyond where the track was laid, the cost of taking care of the tools, teams, & prop-
217 erty after the stoppage of the work, the depreciation in value of the tools, teams, and so forth, on the work at the time of such stoppage & occasioned thereby, the consumption of supplies so far as pl'ffs had not been paid for them, the railroad-ties, the telegraph-poles, and said 70 b'll's cement; and def't by its counsel then & there excepted to the decision of the court in so allowing each of such matters of evidence respectively, to stand; and the def't by its counsel among other objections to said evidence respecting the property, objected that it appeared that said Hopper, one of the pl'ffs, had no interest therein at the time of the stoppage of the work or subsequently; but the court held

this objection to be immaterial, & overruled the same; and def't by its counsel then & there excepted to the decision of the court overruling said objection.

The court thereupon charged the jury orally, and after stating that the point had been made by defendant that the contracts on which the action was based were contracts of mutual and dependent covenants, and that inasmuch as the declaration itself and the testimony showed that the plaintiffs themselves had broken their covenants prior to the alleged breach by the defendant, therefore the plaintiffs could not recover in an action of covenant.

The court thereupon called attention to and commented on sun-
218 dry provisions of the contracts of Sept. 7, 1871, & Jan. 25, 1872, relative to the changing of modes and amounts of work, the changing of the line, an absolute stoppage of the work at the will of defendant or the engineer; and also for the placing of the force by order of such engineer upon a different part of the line from that which plaintiffs might at any time have in hand, and expressed the opinion in view of the whole contract that the same was flexible so far that the times therein fixed for completing different parts of the road were not of the essence of the contract; and that if defendant recognized the contract as in force after default by plaintiffs, defendant was estopped, as it were, from subsequently setting up that failure in point of time; and if, therefore, the plaintiffs were continually in the performance of the work with the consent, express or implied, of defendant at the time of the alleged breach by the defendant, then the defendant should be held to have waived any such breach or shortcoming on the part of the plaintiffs prior to that time; in which case defendant would be estopped by its own act from setting up the previous failure of plaintiff as an answer to defendant's own failure.

And the defendant, by its counsel, then and there excepted to the
219 decision of the court by ruling as to the right of the plaintiffs to maintain this action notwithstanding a failure on their part to do the work within the contract-times.

And the court, having thereupon stated to the jury the pleadings and the substance of the contracts, charged the jury:

That the first issue which the court thought material for the jury to consider was, whether the defendant had excused or waived whatever breaches or violations of contract had been committed by plaintiffs prior to the date of the alleged breach by the defendant; and as to this, the court ruled that if, at the time of such alleged breach on the part of the defendant, the plaintiffs were, with the consent of the defendant, engaged in fulfilling and performing the contract, then the defendant had waived default on the part of the plaintiffs as to the time for completing the several parts of the road, to wit, the third twenty miles on the 15th of September; the 4th 20 miles on the 15th of November; and the 5th 20 miles by the 15th of December, & the jury would be justified in finding the issue on the fifth plea for the plaintiffs; and if this issue was found for the plaintiffs, then the contract would be considered by the court in full force at the time of the alleged breach by the defendant.

And to the charge and instruction so given by the court, the
220 defendant, by its counsel, then and there excepted.

And the court charged the jury, in the same connection, that it was not necessary that there should be a written waiver, nor even a waiver in express terms by any set formal words, but it might be by the conduct of the parties, as treating the contract still in force, paying estimates, and agreeing to the terms of the contract, which were circum-

stances tending to prove a waiver and excuse, the burden of proving which was on the plaintiffs, who were bound to make it out by a preponderance of evidence, if there was a conflict.

And the defendant, by its counsel, then and there excepted to said charge and instruction so given, as to the grounds or circumstances on which the jury were allowed to find a waiver & excuse of plaintiffs' breaches.

And the court further instructed the jury that if they found for the plaintiffs on such issue as to whether defendant had waived or excused the failure on the part of the plaintiffs to have said several parts of the road completed at said several and respective dates, it would become the duty of the jury to enquire whether the defendant had committed the breach of contract set out in the declaration; that is to say,

221 that if the parties treated the contract as existing and binding, and were acting under its terms up to the time when it was alleged that defendant broke it, then it would become the duty of the jury to enquire whether defendants had broken the contract as alleged in the declaration. And if from the evidence, the jury found that defendant at any time, on or about December 15th, 1872, for the precise date was not material, informed plaintiffs, or gave them to understand that defendant was unable to pay the estimates then due for work under the contract, and that it was uncertain or doubtful whether it would be able to pay future estimates for work, then the jury would be justified in finding that the breach alleged against defendant was proved, and that plaintiffs, by reason of such breach, had the right to stop the work on their part.

And to the instruction so given by the court, allowing a recovery on the conditions therein stated, the defendant, by its counsel, then and there excepted.

The court then charged the jury that if they found the breach to have been so committed by the defendant, the rule by which the plaintiffs' damages were to be fixed and estimated was as follows:

222 First, that the plaintiffs would be entitled to recover all sums of money due for work performed under the contract; that these sums the jury would ascertain mainly from the estimates and the evidence of the chief engineer as the most reliable data upon which the jury could make their computation and base their verdict.

And the court, stating that the jury were to determine the amounts, then proceeded to recapitulate the items, for convenience, stating the November estimate for work done in October to be $42,832.49; December estimate for work done in November, $23,609.23; final estimate made in December of all the work done up to that time, not included in previous estimates, $10,042.05.

To which instruction or part of said charge the defendant, by its counsel, then and there excepted, and especially to as much of the charge as allowed the jury to go beyond the estimates.

And the court thereupon added, in charging the jury:

"There are certain disputed items claimed by the plaintiffs in addition to these estimates. The first of these is what is termed the bonus of $15,000, due on the completion of the first sixty miles. By the terms of the contract, this sum was to be held or retained by the defendants as security for the completion of the first sixty miles; and I charge you, if

223 you find from the evidence that the defendant was guilty of the alleged breach set forth in the declaration, then, as said breach occurred before the sixty miles was completed, and the plaintiffs, by reason of said breach, had the right to stop their work, this sum, which

was held by defendants in the nature of a claim for the completion of the work, should be paid over to the plaintiffs, as it would seem to me manifestly inequitable for the defendant to retain this sum after defendant had virtually, by its own act, put the contract at an end. So that I charge you, if you find from the evidence that the defendant violated the contract, as charged in the declaration, it then became liable to pay that sum of $15,000 over to the plaintiffs. By the terms of the contract of July 18th, it seems to me that the sum of $30,000 was to be paid and had been fixed upon by agreement of parties as liquidated damages or compensation for the extra work which had been performed and was to be performed on the first forty miles of work, and $15,000 of this $30,000 was to be paid in cash at the time of the execution of the July contract, and the remaining $15,000 is the $15,000 item I am now discussing. In other words, this $15,000 had been earned, and was due to plaintiffs for work done on the first 40 miles of road, and was retained by defendants as a guaranty for the faithful completion of the next twenty miles
224 beyond. I hold that if the defendants made default so as to prevent plaintiffs from completing the next twenty miles of road, so as to be entitled to recover this $15,000, then the plaintiffs are entitled to have it back by reason of such default. It is in the nature of a security or pledge deposited with the defendants."

To which said instruction or part of said charge tending to authorize a finding for said $15,000, said defendant then and there excepted.

And the court charged the jury as follows:

"The next item is what is termed the retained percentage of fifteen per cent., amounting to $19,937.55. The same reason, it appears to me, that the $15,000 should be allowed, governs also in regard to this item of retained per cent. It is held after the work is done as security for the final completion of the entire job; that is, it is so much kept back out of the monthly estimates, and if the contract is broken so as to justify the plaintiffs in abandoning the work, then this sum should no longer be held back."

To which said instruction or part of said charge, said defendant, by its counsel, then and there excepted.

And the court proceeded further to charge:

225 "The next item is for the extra cost for moving earth by train on sections from 42 to 46, amounting to $11,708. You will recollect the evidence on this point. Mr. Alexander testified that the extra cost of doing this work was to be paid by defendant; while Mr. Phillips testified that the increased pay, if any, was to be fixed by the engineer, Captain Wellman; and Captain Wellman says he never fixed such cost, and cannot do it now; so you will decide upon the testimony of Mr. Alexander and Mr. Phillips, between whom there is some conflict, not, however, in every particular, but only as to the extent of extra compensation, if any, because Mr. Phillips agrees that there was talk of compensation being fixed by the engineer. Mr. Alexander claims that it was fixed between them; and this being a claim for extra allowance not included in any estimate to the plaintiff, nor included specifically in any provision of the contract by defendant, not specifically enumerated or provided for, I have not deemed it proper to perhaps jeopardize the entire verdict which the jury may render in the case by allowing you to include this in your general verdict, and shall direct the jury to consider this item by itself; and if you find, from the evidence, that Mr.
226 Phillips did agree with the plaintiffs, or with Mr. Alexander, for the plaintiffs, to pay the extra cost for doing this work by the train, as testified to by Mr. Alexander, and if you find further, from the

evidence, what the amount of this cost is, you will return it in the form of a special verdict. I will propose the form of a special verdict for you.

"The next item is for $2,167.20 for ties furnished by the plaintiffs to defendant, and for which the engineer has returned an estimate in the form of a voucher. You will recollect the testimony upon this point, and if the testimony satisfies you that this item is proved, you will be justified in allowing it."

To the giving of which said several and respective parts of said charge pertaining to the moving of the earth by train, and to said ties, and to each of said matters, defendant, by its counsel, then and there excepted.

And the court thereupon further charged the jury:

"SECOND. Now pass from all the items for work done under the contract for which plaintiffs have made claim, and come to the special damages claimed by the plaintiffs.

The general rule is that the plaintiffs in an action like this can only recover such damages as are the natural consequence of the
227 breach of the contract of which the defendant is guilty; and the actual damages must be direct and immediate, and not remote, consequential, and undetermined. Acting under this rule, I have already excluded from your consideration the plaintiffs' claim for special profits for the unperformed work, including the unperformed track-laying and the unperformed corduroying provided for in the contract of July 18th. But there may be a class of damages disclosed by the testimony to which this objection does not apply. For instance, the evidence shows that a supply-road had been cut by the plaintiffs at an expense of $5,380, as I have the figures; and if you find from the evidence that this expenditure was made for the purpose of carrying on the work, and that it became useless to the plaintiffs by the act of the defendant, you can allow the cost of that as damages to the extent to which it became useless by reason of the act of defendant. What I mean by this 'became useless' is: The supply-road, you will remember, had been constructed from—if my recollection serves me right—in the vicinity of section 40 along up the line of the road to section 75 or section 76. It was not necessary, as was testified to here by all the witnesses, below where the track was laid, as supplies were brought in by train along the track; so that this supply-road must have been built with the expecta-
228 tion of its becoming useless as rapidly as the track progressed; and I don't think that the cost of the supply-road should be charged as damages beyond where it was available for the purpose of constructing the work, that is, below the end of the track. You have the items given of the cost of the supply-road from section 42—if my memory serves me right—to the end where it was completed, $5,380. You can ascertain what this would cost per mile, that is, you have the miles, and although that may not be the exact cost of it, because some miles may have cost more than others, yet it is probably the best guide you will have to go upon, and will give the approximate estimate of the cost of that that remained open for use at the time of the stoppage of the work.

"The next item is for a number of houses, shops, stables, &c., and a quantity of lumber and shakes, as they are called, got out for the purpose of building houses on the line for the purpose of accommodating the men on the work. The same rule that I have stated to you in regard to the supply-road holds good in regard to these buildings. If you find from the evidence that they were necessarily constructed for the purpose of carrying on the work, and have become useless, either in whole or in part, to the plaintiffs, by reason of the stoppage of

229 the work, plaintiffs are entitled to recover for their loss in this way if you find for them on the issue as to the breach; but if this lumber was valuable for any purpose, or could have been sold for any purpose, upon the ground where it was, you should deduct such value from the amount of damages plaintiffs claim by reason of such loss. You will recollect what the testimony is in that regard, and adjust the matter as nearly in the light of truth and justice as the testimony will allow you.

"The next item is for the tools, teams, wagons, harness, &c., which the plaintiffs had got upon the line for the purpose of carrying on this work. You have heard the testimony of the witnesses in regard to the value of these supplies. From necessity, the value of these tools and teams of plaintiffs for the purpose of carrying on the work and their value after the work stopped were different; and I direct you that the proper measure of damages is the difference between the value of these articles to plaintiffs for the purpose of carrying on the work and their cash-value at that place to the plaintiffs after the work stopped. I can give you, perhaps, an illustration which will convey my idea more definitely. Take, for illustration, a wagon which had been used for one, two, or three months. It was somewhat worn; it had been

230 taken new upon the work; it would perform service for many months, perhaps to the extent of completing the contract; but if you put it upon the market to sell, it is an old wagon, and must be sold as such, and must bring only the price of a second-hand article; and whether you could sell it at that place would depend upon whether there were persons there needing that kind of commodity. The same rule holds good in regard to any other commodities—pick-axes, shovels, wheelbarrows, &c.; they were, as witnesses testified, all of them more or less partly worn and used; yet they had values for the purpose for which the plaintiffs got them there; and the question for you to decide is, how much they were worth to the plaintiffs when this work stopped. They had no right to abandon or leave them to rot and rust out upon the side of the railroad. It was their duty to take care of them, and make the best sale of them, or show that they were unable to sell them, or, if they had not sold them, to show what the depreciation in value was. But plaintiffs were not obliged to sell these teams, tools, harness, &c., in order to determine that. If they have given you, or attempted to give you, any standard as to what their depreciation was, then it is for you to say whether they have done such, and, if there was a depreciation, how much that depreciation is. As I said before, I

231 reiterate the principle: the real rule of damage is the difference in value between this property for the purpose of carrying on the work to the plaintiffs and its value to the plaintiffs after the work stopped. I think also the jury would be justified in allowing a reasonable sum to the plaintiffs for the care and protection and handling of this property from the time the work stopped up to the time that they were able to get it out of the woods or determine what should be done with it; and, also, there is some testimony to show that the plaintiffs kept their force after the work had practically stopped for quite a long time, from two to six weeks, during which time they boarded and supplied them in the woods, and during which time they consumed a large amount of supplies; and that the men were retained at the request or instance of the defendants, while the defendants were endeavouring to make financial arrangements by which they could go on.

"You will recollect what Mr. Alexander's testimony was in that regard.

There is some of the same testimony from Mr. Rutter, that Mr. Phillips, on or about the 15th of November, on his return after the Boston fire, announced his inability to pay the October estimate then
232 due, but requested Mr. Alexander to keep his men on the work—to keep them together and not allow them to separate—hoping that the company would be able to make arrangements by which they could go on; that the men were kept on the work, and that by the latter part of the month, they not having been paid off, *they* became mutinous and disorderly probably. According to the testimony of Captain Wellman and the other engineers, no work may be said to have been done after the 28th of November. I mean upon the plaintiffs' own job. There were some contractors, subcontractors, in beyond—Hawkins' men, I think, are spoken of—and they did not know the news of the failure of the construction company so soon, and they kept on at work for a few days longer; and I re-iterate this testimony to call your attention to it. You will not be governed by my recollection, because you are the parties whose recollection is to govern in this matter; and I reiterate my recollection of it simply to call your attention to this testimony with reference to this item for damages for supplies consumed during this interval of doubt, in which, as the plaintiffs claim, and upon which they have put in some testimony, they were holding their men upon the work by specious promises, and telegrams were sent to Quinn,
233 their agent on the work, in the expectation that the money would be coming by to-morrow or next day; and from time to time the men were kept in a pacific state, while the construction company were endeavouring to extricate themselves from this financial embarrassment. If you find that these men were kept on this work in this way, and that during this time they were consuming supplies of the plaintiffs, for which the plaintiffs have not been paid from other sources, you will be allowed to include that as an element of damages to such an extent as the evidence justifies.

"And I will say with reference to all this testimony, you are not to allow damages unless you can get at some reliable and appreciable estimate of the value and amount. You are not to branch off into the range of conjecture and allow merely conjectural or supposititous damages.

"You have the testimony before you as to what those supplies cost; you should not go beyond that under any circumstances, and should not give even that amount if you think from the evidence that any portion of these supplies were saved to the plaintiffs, or were lost by their neglect after the men were paid off.

"The next item to which I call your attention is an item for tele-
234 graph-poles, $140. The testimony upon that you will remember. The contract provided that the plaintiffs were to erect the telegraph-poles and put up the wire, defendant to furnish the wire as fast as the clearing progressed, and that the line should be operated for the benefit of the parties; that is, the contractors should have the privilege of sending their messages free over the line; they were to board the operators. This provision it seems to me entitled the plaintiffs to pay for whatever poles they had put up. That is to be determined by you from the testimony.

"As to interest: If you are able from the testimony to fix any specific sum of money as due at any particular time, and which ought then to have been paid in justice by the defendant to the plaintiffs, you will be justified in computing interest upon the same from the time that the money should have been paid up to the time when you render your ver-

dict. But this rule does not apply to any of these items of special damages; it only applies, if at all, to the payment for the work done; such, for instance, as the November payment for the October work, which was, by the terms of the contract, to be paid on or about the fifteenth
235 of November; and for the December work, which, by the terms of the contract, was to have been paid and should have been paid on or about the 15th of December. If you are able, from the testimony, to fix the time, then you are justified in computing interest at seven per cent. on that up to the time of the commencement of the suit.

"I don't think the item of $15,000 for retained bonus should draw interest; nor do I think that the item for retained per cent. should draw interest, because we cannot fix precisely the time when these items should have been refunded or paid to the plaintiffs. It was left in doubt perhaps until the court and jury should pass upon the question whether it was equitable. Therefore, I direct you not to allow this interest upon the $15,000 they claim as bonus, nor upon the $19,937 55 of retained percentage, nor upon any item for extra work that has been claimed, upon which the jury have been requested to pass.

"The amount of this item for moving the earth by the train, on which I ask your special finding, is charged in plaintiffs' account at $11,708. You are to fill that blank according to the testimony, and say whether the testimony sustains the charge or not, both as to whether Mr. Phillips agreed to pay the extra cost, and in such case whether
236 it amounted to the sum claimed or what it did amount to.

"There is a small item of 70 barrels of cement at $3.25 per b'r'l. If the evidence satisfies you that the cement was got upon the work for the purpose of performing it at the time of the stoppage of the work, you will find the difference between its value at the time the work stopped and its value to the plaintiffs for carrying on the work. It is like any other supply. It is just as much supplies, if it was necessary for carrying forward the work, as any other item that was wanted."

And the defendant then and there, on the giving of such charge as to the several and respective matters therein as above recited, objected thereto, and then and there duly excepted to the giving of the same, and then and there particularly and especially excepted to so much and such parts respectively of said charge as tended to authorize an allowance for work performed or materials therefor provided where no estimate for the same by the engineer had been made or appeared to have been applied for; defendant claiming that the estimates should be deemed conclusive where there was no evidence of fraud, nor of any refusal of defendant to have such work and materials estimated; and also defendant,
237 by its counsel, then and there in apt time excepted to the several parts of said charge tending to authorize the recovery of the $15,000 payable when the road should be completed to section 60, the 15% reserve fund, alleged extra cost of moving earth by train, ties referred to in the charge as amounting to $2,167.20, the cost of part of the supply-road, the houses, tents, shops, stables, lumber, shakes, &c., the tools, teams, wagons and harness, the supplies referred to in the charge as consumed or subject to be consumed, the charge for services in taking care of the property, the interest and the rate thereof fixed by the court, the charge for telegraph-poles and the cement aforesaid; as to each and every of which said several and respective matters in said charge the said defendant then and there excepted.

And as to the claim of the defendant for damages for the non-completion by plaintiffs of the third, fourth, and fifth divisions, or parts of 20

miles each, of the road according to the contract, the court thereupon charged, as follows:

"The testimony of Mr. Phillips, if I remember right, is, that if this road had been completed on to section 60 or 100, men would have gone in there with saw-mills, and manufactured lumber, and he would have had the profit of hauling that lumber to market. Then this de-
238 pended upon the contingency of whether men would go in there and build saw-mills, and if they built saw-mills whether they furnished him the lumber to haul; and if he would have made a profit upon it, would depend upon the condition of the lumber-market: First, whether the men went there; second, whether they would manufacture lumber; third, the quantity of lumber they might make; fourth, whether there was any profit in hauling it for them after it was made.

"This you see makes it too remote as to whether any profits would have been realized by the use of the road. This road was to be built through a wilderness country. There is so local travel or local business upon it. The road is expected to create its own business, and it is uncertain how much it would create, and how much defendants would realize upon it. These items should therefore be excluded."

To which part of said charge so excluding the defendant's claim for damages for breach of the contract on the part of the plaintiffs, defendant, by its counsel, then and there excepted.

And the court thereupon further charged the jury as follows:

"So in regard to the item of defendant's claim for interest: It is claimed that if this road had been completed the railroad would
239 have paid the construction company a certain amount of bonds, and that these bonds would have drawn interest. But in the question as to whether it would have realized any profits, I think is too remote. There is another item of fact for you to consider as bearing upon this question, for the claim for the use of the road, and that is, there is evidence tending to show that this construction company only had iron to lay the track sixty-five miles; so that with this testimony in the case I am, I think, justified in excluding these two items of the claim for interest, and for the use of the road, from your consideration, and I shall do so."

And the defendant, by its counsel then and there excepted to the giving of said part of said charge thus excluding any claim of defendant for damages.

And the court thereupon submitted to the jury two papers for special findings, directing the jury to find specially upon the questions proposed in said papers, yes or no, such papers being as follows:

"FIRST SPECIAL FINDING.—Had defendant, at the time of the breach alleged in plaintiffs' declaration, waived or excused the failure of the plaintiffs up to that time to complete certain parts of their con-
240 tract within certain times in the contract mentioned, which time had then elapsed; and were the plaintiffs at the time of said alleged breach engaged in the performing of said contract, with the consent of defendant?

"Yes. | No.

"SECOND SPECIAL FINDING.—Had the defendant, at the time plaintiffs stopped the work in question, given the plaintiff to understand that defendant was financially unable to pay the estimates for work then done, and would probably be unable, for a time, to pay future monthly payments?

"Yes. | No."

And the court also submitted to the jury for a further special finding by them thereupon, or as to the matters therein embraced, another paper, as follows:

"SPECIAL VERDICT.—We, the jury, find from the evidence that the defendant agreed to pay to plaintiffs the extra cost of doing the earthwork by train on certain sections between 40 and 46; and we also find from the evidence that such extra cost amounted to , which should be added to the amount of damages found by the general verdict."

And defendant, by its counsel, then and there excepted to the decision of the court in submitting to the jury such form for a special finding.

241 And the jury thereafter returned a general verdict in favor of the plaintiffs, for the sum of $107,353.44, as elsewhere appears.

And the jury also filled the blank in the said paper, so entitled "special verdict," with the sum of $11,708.00, and signed and returned said paper, and also signed and returned said papers, marked "First special finding" and "Second special finding," signing under the word "yes" thereon, striking out the word "no" at the right of said word "yes;" thus answering affirmatively the question in each of said papers stated.

And defendant, by its counsel, then and there moved the court for a new trial, for the reasons stated in the motion, & which was filed by defendant; but the court denied such motion.

And the defendant, by its counsel, then and there moved the court in arrest of judgment, but the court denied said motion, and defendant, by its counsel, then and there excepted to the decision of the court denying such motion.

And defendant, by its counsel, at the time of the said several exceptions aforesaid, prayed the matters aforesaid showing such exceptions and pertaining thereto might be preserved as a part of the record, to the end that the defendant might have the benefit of its said several exceptions; and this bill of exceptions is accordingly signed and

242 sealed, and made a part of the record.

H. W. BLODGETT. [L. S.]

(Endorsed:) Filed July 19th, 1873. W'm H. Bradley. clerk.

243 Afterwards, to wit, on the 28th day of July, A. D. 1873, said defendant, by its attorneys, filed in said clerk's office its bond in said entitled cause; which said bond is in the words and figures following, to wit:

Bond.

For the Supreme Court of the United States.

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, Joseph O. Rutter, and Andrew J. Hopper, plaintiffs, who sued for the use of Mark T. Seymour, Elijah S. Alexander, and Joseph O. Rutter, *vs.* PHILLIPS AND COLBY CONSTRUCTION COMPANY, defendant.	Action in covenant in circuit court of United States, northern district of Illinois.

Know all men by these presents that we, Charles A. Gregory, A. B.

Meeker, O. S. Hough, R. M. Hough, E. B. Phillips, Charles Fargo, Henry F. Eames, are held and firmly bound unto the above-named Mark T. Seymour, Elijah S. Alexander, Joseph O. Rutter, and Andrew J. Hopper, who sued as aforesaid, in the sum of two hundred thousand dollars, lawful money of the United States, to be paid to the said Mark T. Seymour, Elijah S. Alexander, Joseph O. Rutter, and Andrew J. Hopper, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly
244 by these presents, sealed with our seals, including the corporate seal of said company, and dated this 19th day of July, A. D. 1873.

Whereas the above-named Phillips and Colby Construction Company have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the northern district of Illinois:

Now, therefore, the condition of this obligation is such that if the above-named Phillips and Colby Construction Company shall prosecute its said writ of error to effect, and answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[CORPORATE SEAL.] PHILLIPS AND COLBY CONSTRUCTION COMPANY,
By E. B. PHILLIPS, *President.*
CHARLES A. GREGORY. [SEAL.]
A. B. MEEKER. [SEAL.]
O. S. HOUGH. [SEAL.]
R. M. HOUGH. [SEAL.]
E. B. PHILLIPS. [SEAL.]
CHA'S FARGO. [SEAL.]
HENRY F. EAMES. [SEAL.]

Approved:

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed July 28, 1873. W. H. Bradley, cl'k.

245 And on the same day, to wit, the 28th day of July, in said July term, A. D. 1873, of said court, in the record of the proceedings thereof in said entitled cause, appears the following entry, to wit:

MARK T. SEYMOUR ET AL.
v.
PHILLIPS & COLBY CONSTRUCTION COMPANY. } Covenant.

The said defendant, together with their sureties on the supersedeas bond, appear in open court, and acknowledge the execution of said bond, and severally justified as to their sufficiency, when the bond was duly approved by the court.

246 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein said Mark T. Seymour

et al. are plaintiffs, and the said the Phillips & Colby Construction Company is defendant, as appears from the records of said court now remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in Chicago, in said district, this third day of October, A. D. 1873, and of our Independence the 98th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

247 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between Mark T. Seymour, Elijah S. Alexander, Joseph O. Rutter, and Andrew J. Hopper, (suing for use of Mark T. Seymour, Elijah S. Alexander, and Joseph O. Rutter,) plaintiffs, and the Phillips and Colby Construction Company, defendant, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appear', and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the said
248 Supreme Court, to be then and there held, that the said record and proceedings may be inspected and the said Supreme Court may cause further to be done therein to correct that error what of right and according to law and custom of the United States should be done.

Witness the Hon. Nathan Clifford, Acting Chief Justice of the Supreme Court of the United States, this 28th day of July, 1873, and of our Independence the 98th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

(Indorsed:) Sup. C't U. S. Phillips & Colby Construction Company vs. Mark T. Seymour et al. Writ of error. C. D. Roys, att'y for pl'ff in error.

249 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Mark T. Seymour, Elijah S. Alexander, Joseph O. Rutter, and Andrew J. Hopper, suing for the use of Mark T. Seymour, Elijah S. Alexander, and Joseph O. Rutter, plaintiffs, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United Strtes, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein the Phillips and Colby Construction Company is plaintiff, and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness Henry W. Blodgett, district judge and presiding judge of said circuit court of the United States, this 28th day of July, in the year of our Lord one thousand eight hundred and seventy three.

H. W. BLODGETT, *Judge.*

250 We hereby accept service of *of* the within citation this 28th day of July, A. D. 1873.

SLEEPER & WHITON,
Att'ys of Def'ts in Error.

(Indorsed:) Sup. C't U. S. Phillips & Colby Construction Company vs. Mark T. Seymour et al. Citation.

(Indorsement on cover:) No. 255. The Phillips and Colby Construction Company, plaintiff in error, vs. Mark T. Seymour, Eliza S. Alexander, J. O. Rutter, and Andrew J. Hopper, who sue for the use of M. T. Seymour, Elijah S. Alexander, & J. O. Rutter. N. Illinois C. C. U. S. Filed 15th October, 1873.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1874.

No. 255.

THE PHILLIPS & COLBY CONSTRUCTION COMPANY,

Plaintiff in Error,

vs.

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, J. O. RUTTER AND ANDREW J. HOPPER, WHO SUED FOR THE USE OF M. T. SEYMOUR, ELIJAH S. ALEXANDER AND J. O. RUTTER.

Error to Circuit Court for Northern District of Illinois.

Statement of Errors Relied on,	**Page**	**1.**
Abstract of Case,	"	**13.**
Points and Authorities for Plaintiffs in Error,	"	**34.**
Argument for Plaintiffs in Error,	"	**82.**

By THOMAS DENT,

Attorney for Plaintiff in Error.

Jameson & Morse, Printers, Chicago.

SUPREME COURT OF THE UNITED STATES.

No. 255.

OCTOBER TERM, A. D. 1874.

THE PHILLIPS & COLBY CONSTRUCTION COMPANY,
Plaintiff in Error,
vs.
MARK T. SEYMOUR, ELIJAH S. ALEXANDER, J. O. RUTTER AND ANDREW J. HOPPER,
Defendants in Error,
WHO SUED FOR THE USE OF M. T. SEYMOUR, ELIJAH S. ALEXANDER AND J. O. RUTTER.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

SPECIFICATION OF ERRORS, ABSTRACT OF THE CASE, POINTS AND AUTHORITIES, AND BRIEF FOR PLAINTIFFS IN ERROR.

By THOMAS DENT, Attorney for said Plaintiff in Error.

The plaintiff in error assigns and relies upon the following errors:

1. That the Circuit Court erred in permitting the witness Alexander to testify as to the cost to defendants in error, plaintiffs in said Circuit Court, of transporting men to the work from July 18, 1872, to the close of the work.

2. That said court erred in permitting said witness to give evidence of the value of the tents of said defendants in error on the line of their work from section 40 to section 60.

3. That said court erred in permitting said witness to testify as to the worth or value of the log houses or wooden buildings of the plaintiffs.

4. That said court erred in permitting said witness to testify as to the cost of the supply road from section 40 to section 76.

5. That said court erred in admitting testimony that such buildings and supply road became of no value to defendants in error, plaintiffs below, after the discontinuance of the work.

6. That said court erred in admitting testimony as to the depreciation in worth or value of the horses, mules, wagons, and harness of said plaintiffs, by reason of the discontinuance of the work.

7. That said court erred in admitting plaintiffs' testimony in reference to seventy barrels of cement alleged not to have been included in the estimates.

8. That said court erred in permitting plaintiff Alexander to testify as to there being certain ties to the amount of $2,100, which he claimed should have been included in the estimates for October or November.

9. That said court erred in permitting the witness Job Voak to testify in regard to the goods, supplies, tents and tools of defendants in error, alleged to have been taken away by plaintiff in error, in the cars of said plaintiff in error, March 6th, 1873, to Stevens Point; and said court erred in ruling that the objections of the defendant, that the removal of the cars having such property therein was not ground for claim in this case, and that it appeared to have been after the commencement of the suit, were insufficient.

10. That said court erred in permitting said witness to testify as to the value of scattered tools, &c., of said defendants in error.

11. That said court erred in permitting said witness to testify as to the worth of goods of defendants in error in other cars than those which were so alleged to have been removed.

12. That said court erred in permitting said witness to testify as to the value of the buildings and lumber on the line to be used as tents for the men from section 40 to section 60, and as to the value of other lumber on the line.

13. That said court erred in permitting said witness to testify as to his services and salary in taking care of the property of the defendants in error.

14. That said court erred in permitting the witnesses Voak and Wellman, respectively, to testify as to the character of the season after July 18th, 1872, with reference to the prosecution of the work of the defendants in error.

15. The said court erred in receiving testimony offered by the defendants in error as to the sale by them of stock after the suspension of the work.

16. That said court erred in permitting plaintiff Alexander to testify as to an alleged special arrangement between himself and Phillips for the allowance of an extra amount over and above and in addition to the estimates, for the handling of the earth by train, and also as to the extra cost thereof.

17. The said court erred in permitting plaintiff Alexander to testify why the Engineer's letters, requiring an increase of force, were written to plaintiffs, and in refusing to allow said letters to speak for themselves without such comments of this witness.

18. The said court erred in permitting the witness Quinn to testify as to the value of houses, tents and lumber, ties said not to have been included in the estimates, the value of houses on section 23, labor on side track at section 40, and certain freight claimed to have been paid by plaintiffs; and to give in evidence, in respect to said matters, his account of certain items amounting to $3,367 69. (See p. 63 of printed Record.)

19. The said court erred in refusing to allow the plaintiff in error to show what were the means or funds of the defendant, and what arrangement it had made in regard to negotiating securities immediately prior to the Boston fire of November 9 and 10, 1872, and in ruling that "it made no difference how much funds defendant had, for the question was whether defendant paid or not."

20. The said court erred in ruling that the testimony of the witnesses Pratt and Phillips as to a protest or objection to the slowness of plaintiffs' progress with the work being made on the payment of money to defendants in error, in October, 1872, was immaterial.

21. The said court erred in refusing to give the prayers for instructions severally and respectively asked by the plaintiff in error, defendant below.

22. The said court erred in deciding to allow to stand, and in refusing to exclude, the testimony as to the cost of transporting men to the work, the cost of erecting houses, sheds, shanties, stables and shops along the line of the work for the accommodation of the men and the prosecution of the work; the cost of the supply road, beyond where the track was laid; the cost of taking care of the tools, teams and property after the stoppage of the work, the depreciation in value of the tools, teams, etc., on the work at the time of the stoppage, and occasioned thereby; the consumption of supplies so far as defendants in error had not been paid for them; the value of ties said not to have been included in the estimates, and the charge of the defendants in error for putting up telegraph poles, and for the said seventy barrels of cement. (See page 72 of Record.)

23. The said court erred in ruling that it was immaterial that plaintiff Hopper had not, at the stoppage of the work, or subsequently, any interest in the property with which plaintiffs, including said Hopper, proposed to charge defendant.

24. The said court erred in charging the jury that if the defendant, now plaintiff in error, recognized the contract as in force after default by plaintiffs, now defendants in error, the defendant, now plain-

tiff in error, would be estopped from setting up the previous failure of plaintiffs, now defendants in error. The words of this part of the charge so objected to are as follows: "If the defendant recognized the contract as in force after default by plaintiffs, defendant was estopped, as it were, from subsequently setting up that failure in point of time; and if, therefore, the plaintiffs were continually in the performance of the work with the consent, express or implied, of defendant, at the time of the alleged breach by the defendant, then the defendant should be held to have waived any such breach or shortcoming on the part of the plaintiffs prior to that time, in which case defendant would be estopped by its own act from setting up the previous failure of plaintiffs as an answer to defendant's own failure."

25. The said court erred in charging the jury, "If, at the time of the alleged breach on the part of the defendant, the plaintiffs were, with the consent of the defendant, engaged in fulfilling and performing the contract, then the defendant had waived default on the part of the plaintiffs as to the time for completing the several parts of the road, to-wit: the third 20 miles on the 15th of September, the fourth 20 miles on the 15th of November and the fifth 20 miles by the 15th of December, and [that then] the jury would be justified in finding the issue on the fifth plea for the plaintiffs." The part of the charge so alleged to be erroneous is, on a fuller quotation, as follows: "If, at the time of such alleged breach on the part of the defendant, the plaintiffs were, with the consent of the defendant, engaged in fulfilling and performing the contract, then the defendant had waived default on the part of the plaintiffs as to the time for completing the several parts of the road, to-wit: the third 20 miles on the 15th of September, the fourth 20 miles on the 15th of November, and the fifth 20 miles by the 15th of December, and the jury would be justified in finding the issue on the fifth plea for the plaintiffs."

26. The said court erred in charging the jury, "that if the parties treated the contract as existing and binding, and were acting under its terms up to the time when it was alleged that defendant

broke it," "then * * * if the jury found that defendant at any time on or about December 15th, 1872, * * * informed plaintiffs, or gave them to understand, that defendant was unable to pay the estimates then due for work under the contract, and that it was uncertain or doubtful whether it would be able to pay future estimates for work, the jury would be justified in finding that the breach alleged against defendant was proved."

27. The said court erred in instructing the jury as to the rule by which the plaintiffs' damages were to be fixed for work done under the contract, and in allowing the jury to go beyond the estimates as to such work. The words of this part of the charge were: "That the plaintiffs would be entitled to recover all sums of money due for work performed under the contract; that these sums the jury would ascertain mainly from the estimates and the evidence of the Chief Engineer as the most reliable data upon which the jury could make their computation and base their verdict."

28. Said court erred in allowing the jury to include in their verdict all the estimates, especially those made for December.

29. The said court erred in charging the jury that, "if the defendant was guilty of the alleged breach set forth in the declaration, then, as said breach occurred before the 60 miles was completed, and the plaintiffs by reason of said breach had the right to stop their work," the sum of $15,000.00, "termed the bonus which was to be due on the completion of the first sixty miles of the road," * * * "should be paid over to the plaintiffs." This part of the charge, more fully quoted, is as follows: "There are certain disputed items claimed by the plaintiffs in addition to these estimates. The first of these is what is termed the bonus of $15,000 due on the completion of the first sixty miles. By the terms of the contract this sum was to be held or retained by the defendant as security for the completion of the first sixty miles; and I charge you, if you find from the evidence that the defendant was guilty of the alleged breach set forth in the declaration, then, as said breach occurred before the sixty miles was completed,

and the plaintiffs, by reason of said breach, had the right to stop their work, this sum which was held by defendant in the nature of a claim for the completion of the work, should be paid over to the plaintiffs, as it would seem to me manifestly inequitable for the defendant to retain this sum after the defendant had virtually, by its own act, put the contract at an end. So that I charge you, if you find from the evidence that the defendant violated the contract as charged in the declaration, it then became liable to pay that sum of $15,000 over to the plaintiffs." (Pp. 74 and 75 of printed Record.)

30. The said court erred in charging the jury as to the retained percentage of 15 per cent. amounting to $19,937.55 as follows: "The same reason, it appears to me, that the $15.000 should be allowed, governs also in regard to this item of retained *per cent.* It is held after the work is done as security for the final completion of the entire job; that is, it is so much kept back out of the monthly estimates, and if the contract is broken so as to justify the plaintiffs in abandoning the work, then this sum should no longer be held back."

31. The said court erred in charging the jury in reference to the extra cost for moving earth by train, said to have amounted to $11,708, and in permitting that matter to enter into the consideration of the jury or the judgment of the court.

32. The said court erred in charging the jury "that if they found * * * that Phillips agreed with Alexander to pay the extra cost for doing the work [of moving the earth by train], and further found what the amount of the same was, they should return it in the form of a special verdict." More fully quoted, this part of the charge was as follows: "The next item is for the extra cost of moving the earth by train on sections from 42 to 46, amounting to $11,708. * * * If you find from the evidence that Mr. Phillips did agree with the plaintiffs, or with Mr. Alexander for the plaintiffs, to pay the extra cost for doing this work by the train, as testified to by Mr. Alexander, and if you find further from the evidence what the amount of this cost is, you will return it in the form of a special verdict." (Pp. 75 and 76 of printed Record.)

33. The said court erred in charging the jury as to ties not included in the estimates: "If the testimony satifies you that this item [of $2,167.20, for ties claimed to have been furnished by the plaintiffs to the defendant] is proved, you will be justified in allowing it."

34. The said court erred in charging the jury that if the supply road cut by the plaintiffs "became useless to the plaintiffs by the act of the defendant, you" [the jury] "can allow the cost of that as damages to the extent to which it became useless by reason of the act of defendant."

35. The said court erred in charging the jury as to the "houses, shops, stables, etc.," and lumber and shakes, as they are called, got out for the purpose of building houses on the line * * * to accommodate the men on the work," "the same rule * * * stated * * * in regard to the supply road holds good in regard to these buildings. If you find from the evidence that they were necessarily constructed for the purpose of carrying on the work, and have become useless, either in whole or in part to the plaintiffs, by reason of the stoppage of the work, plaintiffs are entitled to recover for their loss in this way, if you find for them on the issue as to the breach."

36. The said court erred in charging the jury as to the tools, teams, wagons, harness, pick-axes, shovels, wheelbarrows, &c., that "the proper measure of damage is the difference between the value of these articles to the plaintiffs for the purpose of carrying on the work and their cash value at that place to the plaintiffs after the work stopped;" and the said court erred in allowing the jury to take into consideration any supposed loss to the plaintiffs upon any such property. The part of the charge so objected to is in these words: "You have heard the testimony of the witnesses in regard to the value of these supplies. From necessity the value of these tools and teams of plaintiffs for the purpose of carrying on the work, and their value after the work

stopped were different; and I direct you that the proper measure of damages is the difference between the value of these articles to the plaintiffs for the purpose of carrying on the work, and their cash value at that place to the plaintiffs after the work stopped. I can give you, perhaps, an illustration which will convey my idea more definitely. Take, for illustration, a wagon which had been used for one, two, or three months. It was somewhat worn; it had been taken new upon the work; it would perform service for many months, perhaps to the extent of completing the contract; but if you put it upon the market to sell, it is an old wagon, and must be sold as such, and must bring only the price of a second-hand article; and whether you could sell it at that place would depend upon whether there were persons there needing that kind of commodity. The same rule holds good in regard to any other commodities: pick-axes, shovels, wheelbarrows, &c.; they were, as witnesses testified, all of them more or less partly worn and used; yet they had values for the purpose for which the plaintiffs got them there; and the question for you to decide is, how much they were worth to the plaintiffs when this work stopped." (P. 77 printed Record.) "The real rule of damages is the difference in value between the property for the purpose of carrying on the work, to the plaintiffs, and its value to the plaintiffs after the work stopped."—*Ibid.*

37. The said court erred in charging the jury, "I think, also, the jury would be justified in allowing a reasonable sum to the plaintiffs for the care and protection and handling of this property (meaning tools, teams, wagons, harness, pickaxes, shovels, wheelbarrows, etc.) from the time the work stopped up to the time that they were able to get it out of the woods or determine what should be done with it." (P. 77 of printed Record.)

38. The said court erred in charging the jury, "If you can find that these men" (meaning workmen in plaintiffs' employ and mutinous men), "were kept on the work in this way" (meaning by specious promises, in the expectation that the money would be coming by to-morrow, or next day), "and that during this time they were consum-

ing supplies of the plaintiffs, for which the plaintiffs have not been paid from other sources, you will be allowed to include that as an element of damages to such an extent as the evidence justifies." (P. 78 of printed Record.)

39. The said court erred in charging the jury as to the item of $140 for telegraph poles, "This provision" (meaning the provision in the contract requiring plaintiffs to place telegraph poles on the line of the work as fast as cleared, and the defendant to wire the poles and furnish an operator to be in a car at or near the end of the iron, etc.), "it seems to me, entitled the plaintiffs to pay for whatever poles they had put up." (P. 78 of printed Record.)

40. The said court erred in charging the jury as to allowing interest on the estimates, "If you are able, from the testimony, to fix any specific sum of money as due at any particular time, and which ought then to have been paid, in justice, by the defendant, to the plaintiffs, you will be justified in computing interest upon the same from the time that the money should have been paid up to the time when you render your verdict." * * * "If you are able from the testimony to fix the time, then you are justified in computing interest at seven per cent. on that up to the time of the commencement of the suit." (Pp. 78 and 79 of printed Record.)

41. The said court erred in charging the jury as to the item of seventy barrels of cement, "If the evidence satisfies you that the cement was got upon the work for the purpose of performing it at the time of the stoppage of the work, you will find the difference between its value at the time the work stopped and its value to the plaintiffs for carrying on the work." (P. 79 of printed Record.)

42. The said court erred in overruling the point made by defendant, objecting to so much and such parts respectively of the charge as tended to authorize an allowance for work performed, or materials therefor provided, where no estimate for the same by the engineer had

been made, or appeared to have been applied for, and when there was no evidence of fraud, nor of any refusal of defendant to have work or materials estimated. (P. 79 of printed Record.)

43. The said court erred in excluding and withdrawing from the jury the consideration of the damages occasioned the defendant by reason of the non-completion by plaintiffs of the third, fourth and fifth divisions or parts of twenty miles each of the road, which were to be done by the plaintiffs by the 15th day of December, A. D. 1872. The part of the charge so objected to is as follows: "The testimony of Mr. Phillips, if I remember right, is, that if this road had been completed on to section 60 or 100, men would have gone in there with saw mills, and manufactured lumber, and he would have had the profit of hauling that lumber to market. Then this depended upon the contingency of whether men would go in there and build saw mills, and, if they built saw mills, whether they furnished him the lumber to haul; and if he would have made a profit upon it, would depend upon the condition of the lumber market: first, whether the men went there; second, whether they would manufacture lumber; third, the quantity of lumber they might make; fourth, whether there was any profit in hauling it for them after it was made. This, you see, makes it too remote as to whether any profits would have been realized by the use of the road. This road was to be built through a wilderness country. There is no local travel or local business upon it. The road is expected to create its own business, and it is uncertain how much it would create, and how much defendant-ant would realize upon it. These items should therefore be excluded."

"So in regard to the item of the defendant's claim for interest: It is claimed that if this road had been completed, the railroad company would have paid the Construction Company a certain amount of bonds, and that these bonds would have drawn interest; but [this], in the question as to whether it would have realized any profits, I think is too remote. There is another item of fact for you to consider, as bearing upon this question, for the claim for the use of the road, and that is,

there is evidence tending to show that this Construction Company only had iron to lay the track 65 miles; so that with this testimony in the case, I am, I think, justified in excluding these two items of the claim for interest, and for the use of the road, from your consideration, and I shall do so." (See page 80 of printed Record.)

44. The said court erred in including in the judgment the amount of the special verdict or finding for the sum of $11,708 00.

45. The said court erred in overruling the motion in arrest of judgment.

THOMAS DENT,
Attorney for Plaintiff in Error.

ABSTRACT OF THE CASE.

This is an action of covenant brought by the defendants in error, on the 17th day of February, A.D. 1873, against the plaintiff in error, on a contract dated July 18th, 1872, executed by the plaintiff in error, as the party of the first part, and the defendants in error, of the second part. (See pages 3 to 6 of printed Record.) That contract required the defendants in error, among other things, to complete the work which was to be done under two earlier contracts, dated, respectively, September 7th, 1871, and January 25th, 1872, for the construction of 160 miles of the road of the Wisconsin Central Railroad Company.

The material parts of said two last mentioned contracts may be stated as follows: *First Contract.* On the 7th day of September 1871, A. J. Hopper, H. S. Boyle and M. T. Seymour, constituting the firm of Hopper, Boyle & Co., agreed with the plaintiff in error to execute, construct and finish in every respect in the most substantial and workmanlike manner, and to the satisfaction and acceptance of the Chief or Assistant Engineers of the Wisconsin Central Railroad Company, or said Phillips & Colby Construction Company, all the work required on that part of the Wisconsin Central Railroad, commencing in what was known as the middle division at the Wisconsin River near Stevens Point and extending to and including Section 40 of said middle division, as shown by a profile of the work. The work was to be commenced in ten days from that date and prosecuted with such force and means as would in the opinion of said Chief or Assistant Engineers insure the completion of the same as follows: The first ten sections on or before October 15th, 1871, the second ten sections before October 25th 1871, the third ten sections before November 5th, 1871, and the remainder before the end of November 1871. (See the contract pp. 6-17 of printed Record.) The *second of the contracts* was dated January 25th, 1872, and was made by said Company as the contractor for building the Wisconsin Central Railroad, as the party of the first part, and said Hopper, Boyle & Co., as

the party of the second part, and by it said Hopper, Boyle & Co. agreed to execute, construct and finish in every respect in the most substantial and workmanlike manner, and to the satisfaction and acceptance of the Chief or Assistant Engineers of said Railroad Company, or said Construction Company, all the work required on that part of said Railroad lying between the north end of section 40 of the middle division and the south end of section 1 of the northern division of said Railroad, thus including about 120 miles of work extending to Penokee Gap at the Iron Range. The work was to be commenced within thirty days, and to be prosecuted with such force and means as would in the opinion of said Chief or Assistant Engineers insure the completion of the same as follows: The first twenty sections by the 15th of July 1872, the second twenty sections by the 15th of September 1872, the third twenty sections by the 15th of November 1872, the fourth twenty sections by the 15th of January. 1873, the fifth twenty sections by the 15th of July 1873, and the remainder by the 1st of October 1873. (See the contract set out at pp. 18-29 of printed Record.) The following provisions are common to both of the contracts last named: The work was to be subject at all times during the progress thereof to the directions of said Chief or Assistant Engineers, or said Phillips & Colby Construction Company, as to the mode of doing the same. The contractors agreed not to sign or transfer the contract or relet any of the work without the written assent of the Construction Company, and agreed to constantly superintend the work personally. The contractors agreed to conform in all respects to the directions and instructions of said Chief or Assistant Engineers, or said Phillips & Colby Construction Company, relative to the work, and to progress with the work at such time or times, in such manner and at such particular points on the line of the work as said Chief or Assistant Engineers should direct. The contract made said Chief Engineer an umpire to decide all matters arising or growing out of the contract between the parties, and provided that if the contractors should in the opinion of the Phillips & Colby Construction Company have failed or refused to comply with any of their stipulations, said company should have a right to cancel the contract and declare it

void, in which event said contractors should have no claim on said Company for damages, compensation or percentage retained over for material or work. Also, that if the contractors should at any time neglect or refuse to progress with the work as fast as in the opinion of the Engineer or said Company, communicated in writing to said contractors, might be necessary for the completion of the work by the time specified, then the company might declare the contract abandoned and the amount retained out of the monthly estimates which would have become due at the completion of the contracts was in such case to be forfeited to the Company; or the Company might, at its option, employ other parties to execute any part of the work, and charge the cost of the same to the contractors, to be be deducted out of such retained percentage, or out of any payment that should have become due on any former estimates, or that might become due on any subsequent estimates. Also, that whenever, in the opinion of the Company, it might be necessary to secure to the laborers their wages, or to parties furnishing supplies and material for the work their pay for such supplies or material, the Company was authorized to pay said laborers or parties the amount due them, in the same manner that the contractors were to be paid, and the receipts for the money so paid were to be deducted from the amount which might be payable to the contractors. Also, that whenever, in the opinion of the Company, it might be necessary to stop any of the work, or to diminish the force employed, the Company was to have the right to do so, and the contractors were to have no claim for damages, but should immediately stop the work, or diminish the force, as the Company might direct. Also, that whenever the quantities or value of any work to be performed under the agreement should be materially increased or diminished by conforming to the directions of said Chief or Assistant Engineers, such increase or diminution in the amount and comparative value of the work was to be determined by said Chief Engineer, and the increase, if any, paid to said contractors, and the diminution, if any, deducted from the amount to be paid under the contract. Also, that the contractors should deposit all excavations upon the road in embankments, where embankments were needed, within an extreme haul of 1,500 feet,

according to the direction of the Company, or that of the Chief or Assistant Engineers, and the contractors were to be paid in such cases for the excavation only, and all surface excavations not needed as embankments were to be deposited in such place or places as the Company or the Chief or Assistant Engineers might direct within an extreme haul of 1,500 feet. The contractors were to take all borrowed earth for embankments from such place or places as the Company or the Chief or Assistant Engineers having charge of the road might direct: and the material was to be measured in embankments, and paid for only at embankment prices, or when material for which no price was specified was hauled by direction of the Chief or Assistant Engineers, the contractors were to have for hauling it a price in the same proportion as the work for which prices were stipulated in the contract. The Chief Engineer was to have power to make such deduction as he thought proper from the stipulated price for any work defectively executed. Where damages might accrue from the acts of the contractors or laborers in their employment, or by reason of any neglect to property in the vicinity of the work during the execution of the contract, the same were to be paid by the contractors, and in case there should be any unsettled claims for such damages when the final estimate was returned, the Company was to withhold, from the retained percentage, a sum equal to such claims and the cost of settling the same, &c., until they should be finally determined. The decision of said Chief Engineer on any point or matter touching the agreement, was to be final and conclusive, and each of the parties waived any and all right of action, suit or suits or other remedy in law or otherwise, under the contract or arising out of the same.

Whenever the work should be, in the opinion of the Chief Engineer, completely finished, in every respect, according to the various stipulations and specifications in the agreement, he was to furnish to the contractors a certificate of the fact under his hand, together with an estimate of the quantity of the various kinds of work, which estimate was to be final and conclusive, and the company was required to pay to the contractors, under the first contract within fifteen days, and

under the second contract within thirty days, after such certificate and estimate should be furnished, the sum which might be due under the contract agreeably to such estimate at certain specified and enumerated rates and prices, which payment was to be as follows: 85 per cent in cash on or about the fifteenth day of every month for all work done the previous month, and the company was to have the right to retain fifteen per centum of each and every estimate made by said Chief Engineer on the work till the whole should be entirely finished to the satisfaction and acceptance of said Chief Engineer, to be evidenced by his certificate to that effect, and the contractors were to be paid in the manner above stated only for the actual work done and materials furnished. (Pages 10, 21 and 22 of printed Record.)

Provision was made that the engineer could give such directions from time to time during the progress of the work as might appear to him necessary and proper in order to make the work complete and perfect on the plan contemplated, and that the quantities of work estimated were approximate, and the company reserved the right of having built only such kinds and quantities, and according to such plans as the nature or economy of the work might, in the opinion of the engineer, require, and any omission to disapprove the work by the engineer at the time of the monthly estimate being made was not to be construed to be an acceptance of any defective work.

Three other special clauses were in the words following: "No charge shall be made by the contractor for hindrances or delay from any cause, in the progress of any portion of the work in this contract, but it may entitle him or them to an extension of the time allowed for completing this work sufficient to compensate for the detention, to be determined by the Chief Engineer, provided he or they shall give the engineer in charge immediate notice, in writing, of the cause of the detention." "Nor shall any claim be allowed for extra work, unless the same shall be done in pursuance of a written order from the engineer, [or he] at his discretion, should direct the claim, or such a part of it as he may deem just and equitable, to be allowed."

Contractors shall commence their work at such points as the engineer in charge may direct, and shall conform to his directions as to the order of time in which different parts of the work shall be done, as the force required to complete the work at the time specified in the contract.

The following special clauses in the contract of January 25, 1872, should also be noticed as having some important bearings upon the questions which are to be investigated: "It is further agreed that the said second party shall take, in part payment of the fifteen per cent. reserved, ten thousand dollars ($10,000) in Portage county (Wis.) bonds, at ninety (90) per cent. of their nominal par value, for each sixty (60) sections or fractions thereof constructed and finished under this contract; that is to say, ten thousand dollars ($10,000) in said bonds when sixty consecutive sections, commencing at the said 40th section of Middle Division, are finished, and ten thousand dollars ($10-000) in said bonds when the remainder of the work described in this contract is finished."

"It is further agreed that, whenever and as fast as twenty consecutive sections of the work are finished, as herein agreed, full payment shall be made for the same in the manner hereinbefore provided, said second party taking such proportion of Portage county bonds as can be conveniently delivered by said first party. It is further agreed that this contract may be terminated by said first party upon giving thirty days' notice of such intention, and in such case the hay, grain and provisions of said second party on the work at the time of giving such notice shall be taken at cost by the said first party." (See page 22 of printed Record.)

The schedules of prices in these two contracts dated September 7, 1871, and January 25, 1872, varied, the prices specified in the latter being higher, in the main, than those named in the former. (See pp. 9 and 21 of printed Record.)

The contract of July 18, 1872, *was between the parties to the suit*, and recited the fact that the two last aforesaid contracts had been made and were annexed to this contract of July 18, 1872, and were made a

part of it, and that the plaintiffs were, as assignees of Hopper, Boyle & Co., to be contractors in the place of said Hopper, Boyle & Co., the plaintiffs assuming the firm name of M. T. Seymour & Co.

The contract then went on to recite that the defendant herein, the party of the first part, for and in consideration of the assignment of said two former contracts to said M. T. Seymour & Co., subject to the conditions thereof, except as in this contract modified, and of a release by said Hopper, Boyle & Co. from all claims for any extra allowance for work done under said two former contracts, and of the covenants and agreements in said two former contracts on the part of said Hopper, Boyle & Co., which were to be fully kept and performed by the said M. T. Seymour & Co., except as in this contract modified and changed; agreed, *first*, that said Construction Company would pay to said M. T. Seymour & Co., at the time of the execution of this agreement on its part, $15,000, and the further sum of $15,000 when the first sixty miles of said road should be fully completed, as in this contract and in said former contracts provided; *secondly*, that said Construction Company would pay 45 cents per surface yard for corduroy where clearing had been done on the line of the road up to the date of this agreement, and 40 cents per surface yard where done on balance of the line, said Construction Company reserving the right to have a revision of the last mentioned price by experts, etc.; *thirdly*, that the Company would pay for the laying of the iron on track $475 per mile, supplying all materials therefor at the side track nearest thereto, and the ties being distributed by said M. T. Seymour & Co., and the Construction Company agreeing also to furnish one engine with fuel and oil therefor, one boarding car and the flat cars and box cars needed for the proper prosecution of the work; *fourthly*, that said Construction Company would pay for work thereafter done on the forty-mile section the prices named and provided in said contract of September 7th, 1871; "it being understood that the said sum of $30,000 paid and to be paid as herein provided is to be received and taken in full for extra allowances on work done and to be done on said section of forty miles, *and in full of all claims for past or future diminution of quantities.*"

And by the same agreement of July 18th, 1872, the plaintiffs, for and in consideration of the assignments of said former two contracts to them, and of the sum of $15,000 in hand paid, and of the sum of $15,000 to be paid as herein provided, and of the covenants and agreements by said Construction Company in said contracts and herein contained, agreed as follows: 1st. That the plaintiffs had taken the assignment of said two former contracts subject to the conditions, covenants and agreements therein on the part of said Hopper, Boyle & Co., to be kept and performed, and would keep and perform the said covenants and agreements in all respect except as modified and changed by this present agreement. 2nd. That said plaintiffs would have the work on the one hundred and sixty miles of road, as in said contracts and this agreement provided, completed at or within the times following, to wit: The first section of forty miles on or before the 1st day of September then next, the third section of twenty miles on or before the 15th of September then next, the fourth section of twenty miles on or before the 15th day of November then next, the fifth section of twenty miles or or before the 15th day of December then next, the sixth section of twenty miles on on or before the 1st day of June then next, the seventh section of twenty miles on or before the 15th day of July then next, and the eighth section of twenty miles on or before the 1st day of October 1873. 3rd. The Construction Company was to have the right to change the quantities of work on the whole line or any part thereof, increasing or diminishing the same at pleasure, the price to be paid per yard or otherwise as provided in said two former contracts, regardless of quantities, and that said M. T. Seymour & Co. waived all claims for damages on account of any such changes. 4th. That said M. T. Seymour & Co. would at all times keep and save said Construction Company harmless against all claims or demands which might be made upon said Company or the Wisconsin Central Railroad Company for the price of labor, work, materials or supplies done or furnished to or on account of said M. T. Seymour & Co., and would pay all damages and costs which said Construction Company or said Railroad Company might be required to pay on any judgment or decree of any court rendered or made upon any such claims.

This agreement also contained other mutual covenants as follows: 1st. That when corduroys were laid the second parties should put down the track and go directly on, leaving the cuts narrow as might be directed by the Engineer, and that said Construction Company might take the track as laid on corduroy and raise it to grade, the object being not to allow said M. T. Seymour & Co. to go back and thus lose time, but that said M. T. Seymour & Co. were to keep a sufficient force of men and teams on the work ahead of the track, where practicable, to raise the track on corduroy to grade by use of materials from cuts.

2nd. That the work of clearing and corduroy should be prosecuted during the winter months, as far as the same might be, in the opinion of the Engineer, practicable; and that that part of the work should be completed by the first day of May, 1873. 3d. That the sum of $15,000, to be paid on the completion of the first sixty miles, as herein provided, was to be held by the Construction Company, together with the fifteen per cent. reserve on and as security for the completion of the third twenty mile section of the road; and that the fifteen per cent. reserve on all the work beyond the first forty miles was to be left in the hands of the Construction Company, and held by it as additional security for the performance of the contract, and to be forfeited to it and applied towards the payment of any damages for failure by said M. T. Seymour & Co. to have the work of the construction of the road completed in the time above specified. 4th. That it was understood that the grubbing in swamps was to be diminished, and close cutting and corduroy substituted at the discretion of the Engineer, and that when done the object would be to enable M. T. Seymour & Co. to use the right of way as a wagon road, and thus to expedite the track-laying. 5th. That said M. T. Seymour & Co. should, at all times, keep and maintain on the work, at the proper points on the line thereof, a force of men and teams efficiently equipped and properly cared for, sufficient, in the opinion of the Engineer of the Railroad Company, to complete the work on the said several sections of the road within the time limited therefor, and that in default thereof, the said Engineer might, from time to time, make his requisitions in writing on said M.

T. Seymour & Co. to increase their force of men and teams, or both ; and in case of failure to comply with any such requisition, in whole or in part, within ten days thereafter, the Construction Company should be, and was, authorized at the proper cost and charge of said M. T. Seymour & Co. to supply any such defficiency in men or teams. 6th. That the parties of the second part in this agreement, being the contractors to do the work and now plaintiffs herein, should forthwith enter into articles of co-partnership with each other, under the name of M. T. Seymour & Co., and that the said Seymour, Rutter and Alexander should each be individually authorized to sign all the papers, receipts or acquittances in relation to the work, and the same should be binding upon all the members of the firm, &c.; and that at the time of the execution and delivery of this present agreement, a duplicate or certified copy of such articles of co-partnership should be delivered to said Construction Company. 7th. That said M. T. Seymour & Co. should place telegraph poles on the entire line of the work as fast as the same should be cleared, and the Construction Company should put up the wire and maintain the line, and furnish and pay an operator at or near the end of the iron, in a car to be moved from time to time as the iron was laid, and that the line so operated should be free to both parties during the construction of the road, and that said operator should be boarded by or at the cost of said M. T. Seymour & Co. (For this agreement see pages 3-6 of printed Record.)

The declaration proceeded to aver that upon the execution of said agreement of July 18, 1872, the plaintiffs became sub-contractors under defendant for the building of one hundred and sixty miles of railroad required to be built under said contracts of September 7th, 1871, and January 25th, 1872; subject to the conditions and upon the considerations set forth in the aforesaid three agreements, and entered vigorously upon the work of completing said one hundred and sixty miles of railroad, in accordance with said agreements; and to that end made a very heavy expenditure, to wit: of $50,000 in procuring men, teams, tools, supplies, and all the various implements and equipments necessary for carrying on the work; that with the approval of defend-

ant, plaintiffs afterwards, to wit: in August, 1872, entered into contracts with divers parties for constructing the westerly one hundred miles of that part of said railroad which was referred to in the agreement of January 25th, 1872, and on such terms that a large profit, to wit: of $200,000, would have accrued to plaintiffs had not the default of defendant prevented them from realizing the same. That in constructing the first sixty miles of said railroad extending west from Stevens Point, plaintiffs expected in executing their agreement to encounter, and did encounter, very difficult work which could not be done at the stipulated price to be paid the plaintiffs therefor, but that they hoped to be compensated for such loss by the profit they expected to make on their contracts with other parties who undertook to construct the remainder of said one hundred and sixty miles aforesaid. That from the time plaintiffs so entered upon the work until on or about December 15th, 1872, they prosecuted it with all the energy and skill they possessed, having men in large numbers, to wit: more than 1,000 in number, at work, with suitable teams and other equipments along the whole line of said one hundred and sixty miles of road, and incurring much extra expense not contemplated in said agreements made by the plaintiffs, but in order that the work might be done in the best manner and to the entire satifaction of the defendant, and down to the date last aforesaid the defendant, by its proper officers, had expressed entire satisfaction with the manner in which the plaintiffs were doing the work, and with the rate of progress the plaintiffs were making towards completing the same, and all the work so done by the plaintiffs was approved of by the Chief Engineer of the Railroad Company as being in entire conformity with the plaintiffs' said agreement in that behalf, and at the date last aforesaid the plaintiffs had actually completed to the satisfaction of the said Chief Engineer, and of the said defendant, fifty-three miles of said railroad westerly from Stevens Point, and nearly finished the remaining seven miles necessary to complete that portion of the work which they had contracted with other parties to have performed as aforesaid; that at the date last aforesaid, while the plaintiffs with a large force of men and teams, with all the necessary tools and apparatus, were actually and successfully prosecuting the

work as aforesaid, and while the defendant was indebted to the plaintiffs in a large sum, to wit: $250,000, for payment due to the plaintiffs for work done under the provisions of the aforesaid contracts without any notice to or information on the part of the plaintiffs, that it, the defendant, was laboring under financial embarrassment, they, the plaintiffs, were suddenly, to wit: at said date, notified by the defendant that it, the defendant, was unable to pay the sum last aforesaid due to the plaintiffs, or any part thereof, and was wholly destitute of means to make future payments upon said contracts to the plaintiff, and so left the plaintiffs to shift for themselves and save what they could from the wreck of the undertaking, and ever since the defendant has continued to be insolvent, and has utterly failed and refused to pay the aforesaid sum due the plaintiffs for work done as aforesaid or any part thereof, whereby the defendant by its own fault and without the consent of the plaintiffs or any fault on their part, rendered any further work by the plaintiffs under the said contracts impossible, and so the plaintiffs were in fact thereby absolved from all further attempts to perform the same. And they, the plaintiffs, further averred that in addition to the amount due them as aforesaid for work done under the said contracts in pursuance of the stipulations therein contained, including the bonuses and retained percentage therein agreed to be paid, the plaintiffs suffered special damages by reason of the premises aforesaid in a large sum to wit: $250,000, which sum they alleged to be due from the defendant; and they specified the following items of such special damages: 1st. The cost of hiring and transporting from Chicago to said Stevens Point a large number, to wit: 1,000 men to work under said contracts immediately prior to their unlawful abrogation by the defendant as aforesaid, so that the plaintiffs wholly lost such cost, to wit: $10,000; 2nd. The cost of erection by the plaintiffs along the line of the Railroad in the fall of 1872 of a large number, to wit: fifty houses for the accommodation of their workmen during the ensuing winter, which cost was a large sum, to wit: $10,000, and was wholly lost to the plaintiffs by reason of the premises aforesaid: 3rd. The cost of a supply road constructed through heavy timber in the Fall of 1872, to enable supplies and provisions and other

necessaries to reach the line of Railway from adjacent settlements during the ensuing winter, which cost was a large sum, to wit: $10,000; 4th. The cost of collecting together, housing and guarding the tools and equipments of the plaintiffs on the line of the Railroad during the winter of 1872-1873, made necessary by the aforesaid acts of the defendant, which cost was a large sum, to wit: $5,000, and was wholly lost to the plaintiffs; 5th. The depreciation in value of the plant or stock of the plaintiffs collected by them for the purpose of carrying on the work, including the teams, implements and equipments of every sort usual on Railroad work, and which stock was suddenly rendered unavailable to the plaintiffs in a wild, unsettled region by reason of the aforesaid unlawful acts of the defendant, which depreciation was a large sum to wit: $10,000; 6th. The losses suffered by the plaintiffs from litigation and controversies with various parties who with the consent of the defendant had taken contracts from the plaintiffs to perform the work necessary to be done on the westerly one hundred miles of said Railroad, work under which contracts was necessarily terminated by the aforesaid default on the part of the defendant, which losses so suffered by the plaintiffs amounted to a large sum, to wit: $30,000; 7th. The damage suffered by the plaintiffs by reason of the loss to them of the profits at which they had let to other parties with the consent of the defendant the work on the westerly one hundred miles of the rail road, of which profits plaintiffs were deprived by the aforesaid wrongful acts and default of the defendant; which profits amounted to a large sum, to wit: $175,000. The Declaration concluded with an averment that the defendant had not paid the said sums of money so due from it, but wholly neglected and refused so to do, and so had not kept and performed its covenants, but had wholly broken the same, to the damage of the plaintiffs, $500,000. (See the declaration at pages 3-32 of printed Record.)

The defendant interposed a demurrer to the declaration, assigning special causes (pp. 32 and 33 of printed Record), but the demurrer was overruled and the plea of *non est factum* and sundry special pleas were filed.

These pleas presented the following, among other defences: The tenth plea denied that the defendant had broken its covenants, or any of them, in manner and form as alleged, and concluded to the country; the second plea averred general performance and readiness to receive and pay for the work and material required to be done and promised by the plaintiffs; the fifth plea alleged that the plaintiffs, without the causes or excuses or any of them in the declaration mentioned, failed to observe, keep or perform said contracts on their part, and had wrongfully refused to prosecute the performance of the work with such force and means as would in fact, or in the opinion of the Chief or Assistant Engineers of the Wisconsin Central Railroad Company, insure the completion of the work or any part thereof required of them by the contracts in the time or manner in that behalf limited by the contracts; the sixth plea denied that the defendant gave any such notice to the plaintiffs as the declaration alleged, and denied that the defendant absolved or excused the plaintiffs as the declaration alleged, or was in fact insolvent in manner and form as by the declaration supposed, and concluded to the country; the fifteenth plea alleged payment as to moneys due the plaintiffs, and that as to a large part of the moneys supposed by the declaration to be due the plaintiffs for work done, they were paid by the defendant to the plaintiffs, and defendant had to pay a further larger sum, to wit, $35,000, to laborers under plaintiffs, and a further large sum, to wit, $25,000, for supplies and materials furnished or caused to be furnished by plaintiffs for the work, etc. In the twelfth amended plea of the defendant (see pp. 43–46 of printed Record), set-offs were more particularly alleged in this, to-wit, that by reason of the failure to complete the several sections of the road which were to be completed by the plaintiffs on or before the 15th of December, 1872, the defendant had suffered great loss and damage, to wit, $150,000, and by reason of the plaintiffs willfully abandoning the work, the defendant had as to the residue of the road, lost a large sum, to wit, $100,000; and by reason of the plaintiffs' failure to complete by the 15th of December, 1872, the defendant had lost a large sum, to wit, $200,000, in not obtaining $25,000 first mortgage bonds upon and for each mile of the road which was to be completed under

the contracts. The plea last mentioned also alleged that the plaintiffs fell into arrears in paying laborers and material men, and such laborers and material men obtained liens, which defendant was obliged to pay, to a large sum, to wit, $100,000.

To the second plea the plaintiff replied denying performance and readiness to perform on the part of the defendant in manner and form as that plea had alleged. To the fifth plea the plaintiffs replied that at the time of the prevention and absolution by the defendants of the plaintiffs further continuing to prosecute the work, the defendant had excused any supposed omission on the part of the plaintiffs to perform the work strictly in accordance with the terms of the contracts, and had accepted the work done by the plaintiffs as a sufficient compliance on their part with all the covenants in the contracts down to the date of such prevention and absolution by the defendant, and that the defendant did not at any time notify the plaintiffs that it had elected to cancel the contracts by reason of the failure or refusal in its opinion of the plaintiffs to comply with any of the stipulations in the contracts, and did not at any time communicate to the plaintiffs in writing or otherwise the opinion of the defendant, or of any of the Engineers of the Wisconsin Central Railroad Company, that the plaintiffs had neglected or refused to progress with the work as fast as would be necessary for the completion thereof within the time specified in the contracts, but on the contrary the plaintiffs at the time of such prevention and absolution by the defendant were in fact prosecuting the work required to be done by the contracts with such vigor and means as would have enabled the plaintiffs to fully complete the work within the time limited by the contracts. This replication concluded with a verification. The replication to the fifteenth plea concluded to the country, and denied the payments alleged in that plea to have been made by defendant, and averred that if the defendant had paid sums of money to laborers employed by the plaintiffs, or for supplies or materials, the payments were voluntary, and without plaintiffs' authority, and that they were not under the provisions of the contracts. The replications mainly concluded to the country, and issue upon them was joined by a

a similiter except as to the replication to the fifth plea, to which replication the defendant under the practice in the Circuit Court rejoined by way of general traverse, denying that the matters in said replication stated were true in manner and form as in the replication the same were stated and set forth, which rejoinder concluded to the country.

Thns far, the declaration has been fully set forth, and enough has been stated of the pleas and the issues formed thereunder, to show that the plaintiffs were put under the necessity of making out their case, and that the defendant was entitled, under the pleadings, to make defense by rebutting the allegation of insolvency or notice thereof, and by showing payments, set-offs, counter-claims, &c. In connection with the contracts of September 7th, 1871, and January 25th, 1872, and the assignments thereof by Hopper, Boyle & Co. to M. T. Seymour & Co., the present plaintiffs, it will be observed that, on the 18th of July, 1872, said Hopper, Boyle & Co. executed a receipt to the defendant in full of every claim of any kind or nature, including work done or extra work, or any diminution of quantities, or other matters growing out of said contracts; also, that on the same day said Hopper, Boyle & Co. assigned and transferred to the plaintiffs said two contracts, subject to the performance by the plaintiffs of all the covenants and conditions in said contracts on the part of said Hopper, Boyle & Co., as modified by plaintiffs' agreement of that date with defendant. (See page 64 of printed Record.)

The declaration shows that the plaintiffs did not claim to have executed their contract according to its terms as to the amount of work which was to be done by December 15, 1872, but that they asked payment for a partial and incomplete execution, and sought to excuse imperfect or incomplete execution, so far as time was concerned, as to that part of the road which they had completed, by alleging that the defendant had expressed entire satisfaction with the rate of progress plaintiffs were making towards the completion of the work; and further averred that all the work that was done by the plaintiffs was approved of by the Chief Engineer of the Wisconsin Central Railroad

Company as being in entire conformity with plaintiffs' agreement. The part averred in the declaration to have been completed was fifty-three miles of the road extending westerly from Stevens Point, with an allegation that plaintiffs had nearly finished seven miles more of that part of the road. In point of fact, however, the contract required the plaintiffs to complete one hundred miles of the road by the fifteenth of December, 1872; and the evidence showed that, while the plaintiffs were so required to complete one hundred miles of the road by the fifteenth of December, 1872, they did not have the two first sections of forty miles done within the time required by the contract, and never completed the next section of twenty miles, and did not at last, or when they brought suit, have more than from fifty to seventy-five per cent of the work done on this third section of twenty miles. (Testimony of Wellman, page 65 of printed Record.)

The first section of forty miles extending westerly from Stevens Point was by the plaintiffs' contract to be completed by the 1st day of September, 1872, but was not completed until about the 30th day of that month (p. 54 of printed Record), and all the money due the plaintiffs on account of the same was fully paid. The defendant, however, continued the payment of the monthly estimates regularly until the 15th day of November, 1872. The plaintiffs were then in default in not having completed the work on the third section of twenty miles, which should have been done on or before the 15th day of September, and also in not having completed the fourth section of twenty miles, which should have been done on or before the 15th day of November, 1872.

The estimates were, according to the contract, to be paid on or about the 15th day of each month for the work done the preceding month (pp. 10 and 21 of printed Record). It may be said, therefore, that the plaintiffs had committed three defaults on the 15th day of November, 1872. One of these was in not having completed in the contract time the first section of forty miles. Another was the non-completion of the third section of twenty miles; and the other default

was in not having completed the fourth section of twenty miles. In addition, also, to all these defaults of the plaintiffs, the evidence tended to show that they were not prosecuting the work in general with sufficient force to complete it within the contract time, relating to the last section of the one hundred and sixty miles, and were not prosecuting it with a force satisfactory to the Chief Engineer of the Wisconsin Central Railroad Company, as will be observed from his notices given at page 57 of the printed Record.

Although the defendant paid for the work of plaintiffs on the first forty miles of the road, yet the payment made at that time was under protest, or with objection as to the non-conformity by the plaintiffs with the contract as to time. (Testimony of Pratt and Phillips, pp. 64 and 68 of printed Record.)

No default on the part of the defendant happened until the time for paying the estimates for the October work arrived, which time was on or about the 15th of November, 1872, and the evidence shows that the defendant had made arrangements prior to that time for ample means to pay sums very much larger than those estimates. (P. 55 of printed Record.) But on acount of the happening of the great fire in Boston on the 9th and 10th of November, 1872, these arrangements were frustrated, and the defendant was left with comparatively little ready means, but with securities that would be supposed to be ample to enable it to have the work carried forward. (P. 67 of printed Record.)

The amount of the estimates in favor of the plaintiffs, due at that time, they being estimates No. 1196, 1197 and 1198, (p. 53 of printed Record,) was $42,832.49.

Soon after this time, or perhaps about the last of November, 1872, (see pp. 56 and 65 of printed Record,) the plaintiffs' laborers, or many of them, became unruly, seemingly because they were not paid, and, as plaintiff Alexander testified, for the further reason that the defendant paid out to laborers employed by it to follow after plain-

tiffs and gravel the track, some $12,000 about November 15th, and the plaintiffs' men learning of this got the idea that the defendant was all right financially and that the plaintiffs were not so, the plaintiffs not having paid their men because the defendant did not pay those estimates. (P. 56 of printed Record.)

Afterwards interviews seem to have occurred between some of the plaintiffs and the President of the Construction Company, and in November the defendant paid a draft for $3,453.75 on account of transportation of men for plaintiffs. (Page 56 of printed Record.) No other payment seems to have been made at a later date directly to the plaintiffs; but on or about the 14th of December 1872 the President of the Construction Company returned from Boston to Chicago after having raised about $150,000, and some negotiations took place between the plaintiffs and said Phillips and George Reed, who had accompanied Phillips on the trip to Boston in December to raise money for the defendant. It appears that Phillips and Reed then expressed a willingness to pay plaintiffs $40,000, but required that it should be paid to the men employed, so that the work might go on, and that plaintiff Alexander protested against having the men paid by defendant or under its supervision, and insisted that the money should be paid in Chicago, and that he should have $75,000, before he would talk about going upon the road to pay the men, as Reed and Phillips had desired to have him do. (Page 66 of printed Record.) Interviews of the parties in regard to this matter are somewhat more fully set forth on pages 58 and 59 of the printed Record, where it appears that these interviews took place from December 14th to December 17th, 1872, and that plaintiffs demanded $75,000 while Phillips said he could not let them have more than $40,000, if so much, and that only if they would go to Stevens Point and there receive the money and pay it out to the men, which plaintiffs declined to agree to do. At that time the estimates, all told, including those which were payable on or about December 15th, 1872, amounted to but $66,441.72 exclusive of the 15 per cent. reservation, but the plaintiffs seem to have demanded that reserve, and also a bonus of $15,000 which was not to be due until the completion of the third

section of twenty miles. They appear, also, to have demanded a further though indefinite sum, but under what claim of right is not apparent. Under these circumstances the defendant sent to the line of the work and paid the plaintiffs' employees on the plaintiffs' pay rolls, $26,869, December 19th and 20th, 1872, and Mr. Quinn, the plaintiffs' bookkeeper, noted such payments on the plaintiffs' books. (P. 65 of printed Record.) The defendant also paid $6,215.13 to laborers and material men engaged by Folsom & McConnell, subcontractors under plaintiffs, (p. 69 of printed Record,) and the money was receipted for on the pay-rolls. Also on the 31st day of December, 1872, defendant paid laborers of Whitman & Perkins, subcontractors under plaintiffs, $4,990.60, for which plaintiffs afterwards took credit on settling with Whitman & Perkins (p. 62 printed Record).

These payments to laborers and material men were made under provisions above recited in the contracts of September 7th, 1871, and January 25th, 1872, which allowed the defendant, whenever, in its opinion, it might be necessary, to secure to the laborers and material men their pay, to make payment to them, &c. (See pages 7 and 19 of printed Record.)

After payment of the plaintiffs' men by the defendant, all work by the plaintiffs ceased, as may be, indeed, said to have been the case as early as November 28th, 1872. (Page 59 of printed Record.)

The only possible excuse of the plaintiffs for discontinuing work or ceasing the performance under their contract, was the non-payment by the defendant, on or about the 15th of November, 1872, of the estimates for the October work; and it is manifest that the plaintiffs were then themselves in great default; that they were the parties first in default; and that in their failure and refusal to pay the laborers and material men, they disregarded and violated their contract. It will also be evident, from any reasonable calculation, that they were at fault in the demands they made upon the defendant, on the 14th of December, 1872; for all the estimates introduced in evidence upon the

trial amounted to but $76,483 77, and if we add to that the retained percentage of $19,937 16, we have a total of but $96,420 93, from which, on account of payments, the bulk of which were afterwards made, should be deducted the amounts paid as aforesaid by the plaintiffs to laborers and material men, and on plaintiffs' account for the transportation of men, the sum of $41,528 68, leaving a balance of only $54,892 25 against the defendant.

In the progress of the investigation as to what was allowed to go into the verdict to swell it to $119,061.44, which is $64,169.19 over and above what has been shown to be the full balance upon the estimates and retained per centage after deducting defendant's payments, it will be seen that the result was brought about by allowing $15,000 which was not to become due until the first sixty miles of the railroad should be completed, and by allowing sundry other claims which were altogether illegitimate as damages; illegitimate because they are not connected with the contract, do not grow out of the alleged breach on the part of the defendant, and place the defendant on a worse footing than if it had elected to terminate the contracts, as it was authorized to do.

These damages also, it may here be said, in mildly characterizing the best of them, constitute a premium for the default of the plaintiffs in failing to complete the road within the contract time; since the plaintiffs are to be paid in this way for the supply road and the houses they built along the line of the work which they ought to have completed before December 15th, 1872, and are to be reimbursed for their outlays in transporting men to the work from the date of their contract, and are also to be indemnified in respect to all losses upon the personal property which they had accumulated in their work as contractors, some of which was not possessed by them jointly, and with none of which should they have charged us.

POINTS AND AUTHORITIES.

I

What is the groundwork of the cause of action in general? A brief answer to this question will be given as introductory to an examination of the several errors assigned.

The plaintiffs do not show a performance of or readiness to perform conditions precedent on their part. They took upon themselves stringent obligations, covenanting to perform the work within certain stipulated times as to various parts of it, and to the satisfaction and acceptance of the Chief or Assistant Engineers of the Wisconsin Central R. R. Company or the defendant, and gave the defendant a right to cancel the contract and declare it void, if they, in the opinion of the defendant, should fail or refuse to comply with any of their stipulations, (p. 7 of printed Record,) and agreed that in this event they would have no claim whatever on the defendant for damages, compensation or percentage retained, either for material or work, but that the defendant should have a right to take possession of and hold said material and work absolutely, and that the defendant should be absolved as entirely and completely from the contract as if the same had never been made. (*Ibid.*) Provisions of this character in the contracts of September 7th, 1871, and January 25th, 1872, were continued in force by the contract which the plaintiffs individually made July 18th, 1872, in which they recited that they had taken assignments of said two former contracts, subject to the conditions, covenants and agreements therein on the part of Hopper, Boyle & Co., to be kept and performed. (P. 4 of printed Record.) These stipulations as to time of performance together with others, induced the defendant to pay plaintiffs a large sum over and above the contract price, and on noticing the contracts *in extenso* it will appear that time of performance by the plaintiffs was treated as highly material, and was made a condition precedent to a right of action on the contract, and especially to any right to an action of covenant based upon the contract. In *Fitzgerald* vs. *Hayward*, 50 Mo.

Rep., 524, it was held under a similar contract that "It is only where the plaintiff has been prevented from performance by the wrongful acts of the defendant, that he is entitled to recover." And it was said, "A simple breach of the contract on the part of the defendant, such as non-payment of monthly dues for work done, would not authorize the plaintiff to stop work and recover for unperformed work." (P. 524, 50 Mo.) It was further held in the same case that the time for the completion of the work was of the very essence of the contract, and this for reasons quite applicable to this case. (50 Mo., 517–523.) So it was held in the case of *Stadhard* vs. *Lee*, 3 Best & Smith; Q. B., 113 Eng. Com. Law, 364, where the contract does not seem to have been so stringent upon the contractors as the one on which the plaintiffs rely, that non-performance by the plaintiffs authorized the defendants to enter upon the work and to hold the moneys previously earned by the defendants, and that to the defendants' plea, showing non-performance by the plaintiffs, and possession taken by the defendants, the plaintiffs did not present a good replication in averring that the work proceeded as rapidly and satisfactorily as the defendants reasonably and properly could require; the court holding that nothing short of *mala fides* in the defendants would be a good answer to their plea.

The declaration alleges as an excuse for incomplete performance by the plaintiffs up to the time they stopped work, that the defendant had expressed itself satisfied with the rate of progress they were making towards performance, and that the work they had done had been accepted by the Chief Engineer of the Wisconsin Central Railroad Company, and that in this state of case, and when defendant was indebted to the plaintiffs, they, the plaintiffs, on or about December 15th, 1872, had notice from the defendant that the defendant was laboring under financial embarrassment, and unable to pay plaintiffs for work previously done, or to make future payments on the contract; and they then allege that the defendant has ever since continued to be insolvent.

Thus, to supply omissions in respect to prompt and full performance on the part of the plaintiffs up to December 15th, 1872, they present a verbal or inferential acquiescence by the defendant; and the

first point now made is that this is not sufficient to maintain covenant, as the allegation amounts to no more than a verbal statement by the defendant, expressive of some satisfaction that the plaintiffs were trying to do their work, and does not show a waiver of conditions precedent, performance of which, or *readiness to perform the same*, ought to have been averred by the plaintiffs.

Hoy vs. *Hoy*, 44 Ill, 469.

The plaintiffs should have shown performance by themselves, or an offer to perform, and prevention by the defendant.

Vankirk vs. *Talbot*, 4 Blackf., 367.

But admitting non-performance, they do not aver a prevention of performance ; for the non-payment of moneys, the payment of the same not being a condition precedent, is not prevention.

Palm vs. *O. & Miss. R. R. Co.*, 18 Ill., 217.

2. Nor do the plaintiffs apparently proceed under the contract on account of the estimates made in pursuance of its terms; for they do not allege in the declaration that any such estimates were made. But as to work done, the contract makes it a condition precedent that plaintiffs shall obtain such estimates.

Pres., Dir., &c., D. & H. Canal Co. vs. *Pa. Coal Co.*, 15 N. Y. 250.

There is hardly a direct averment of any indebtedness from the defendant to the plaintiffs. The averment, such as it is, is by way of recital: thus, that *while the defendant was indebted to the plaintiffs* in a large sum, to wit: $250,000, for payments due to them "for work done under the provisions of the aforesaid contracts, without any notice to, or information on the part of the plaintiffs that the defendant was laboring under financial embarrassments, the defendant, on or about December 15th, 1872, suddenly notified them that it, the defendant, was unable to pay the sum last aforesaid due to the plaintiffs, or any part thereof, and was destitute of means to make future payments upon said contracts to the plaintiffs, and so left the plaintiffs to shift for them-

selves and save what they could from the wreck of the undertaking, and that, ever since, said defendant has continued to be insolvent, and has utterly failed and refused to pay the aforesaid sum due the plaintiffs for work done as aforesaid, or any part thereof, whereby the said defendant, by its own fault, and without the consent of the plaintiffs, or any fault on their part, rendered any further work by the plaintiffs, under the said contracts, impossible; and so the plaintiffs were in fact thereby absolved from all further attempts to perform the same." What is thus stated as prevention is not such in fact, and is not an excuse for prior breaches by the plaintiffs; but enough is stated to show that the alleged notice from the defendant that it was insolvent is made the ground-work for a claim against the defendant. That claim, so far as it will be considered in this place, is stated as follows: "And the plaintiffs further aver that, *in addition to the amounts due them as aforesaid, for work done under the said contracts*, in pursuance of the stipulations therein contained, including the bonuses and retained percentage therein agreed to be paid, the plaintiffs suffered special damages by reason of the premises aforesaid in a large amount, to wit: a further sum of $250,000, which sum is now also due to the plaintiffs from the defendant." And the plaintiffs then proceeded to specify seven items of special damage, which will be noticed hereafter. But the question is now presented, as to this action of covenant, whether, when it appears from the contract that at the time of the first breach, alleged by the plaintiffs to have been committed by the defendant, to wit: on or about the 15th of December, 1872, the declaration shows a legal excuse for the non-completion by the plaintiffs of the first one hundred miles of the road? or does it show a readiness on the part of the plaintiffs to perform their covenants? The excuse averred as to not performing further, aside from an expression of inability on the plaintiffs' part to exercise any greater energy or skill down to the date named, is, that the defendant, by its proper officers, had expressed entire satisfaction with the manner in which the plaintiffs were doing the work, and with the rate of progress the plaintiffs were making towards the completion of the work. Now, while this might entitle them to bring their action of assumpsit for any money due them according to the contract

prices for work actually done, it does not appear to be sufficient to entitle them to a recovery in covenant upon the contract itself; for covenant is not sustained by giving evidence of a verbal extension of the time for performance, and such being the case, the contractors cannot, to sustain such an action, rely on a *tacit acquiescence* on the part of the employer, in the doing of a part of the work after the time limited in the contract, when, finally a large part of the work is left undone.

Jewell vs. *Schroeppel*, 4 Cow., 564.
Dermott vs. *Jones*, 23 Howard, 220.
Slater vs. *Emerson*, 19 Howard, 224.
Bourland vs. *Sickles*, 26 Ill., 499.

Parol agreements will not support this action:

2 Greenl. Ev., § 235.
Sherwin vs. *Rutland & Bur. R. R. Co.*, 24 Vt., 347.

3. Then again, as low as is the standard given in the declaration, the charge to the jury reduced it, and put the case on a different footing, in this, among other things, that it left out of view the question whether the defendant had expressed satisfaction with the rate of progress which the plaintiffs had made prior to December 15th, 1872, and informed the jury that if the defendant *recognized the contract as in force after default by plaintiffs*, the defendant was estopped, as it were, from subsequently setting up that failure in point of time, and that if the plaintiffs were continually in the performance of the work with the consent, expressed or implied, of the defendant, then the defendant should be held to have waived any such breach or shortcoming on the part of the plaintiffs prior to that time. This position was maintained throughout the charge, and error is accordingly assigned; for upon such a principle an action of covenant may always be maintained, no matter how gross may have been the departure of the plaintiff from the terms of his own covenant, when, it being for the performance of work, the defendant shall not be found to have made *active opposition* to such performance when not within the contract time. (See errors Nos. 24-26.)

4. At the time of the alleged breach by the defendant, as given in the declaration, the contract called for the completion of one hundred miles of the railroad, that is, the first five sections of twenty miles each; and the position now taken is, that when the time elapsed, on the 15th day of September, 1872, for the completion of the third section of twenty miles, and on the 15th of November, 1872, for the completion of the fourth section of twenty miles, and on the 15th of December, 1872, for the completion of the fifth section of twenty miles, the plaintiff in error was entitled by the terms of the contract to ask for such completion, and that the defendants in error should produce the Engineer's certificate of such completion.

It was on this theory that the first prayer for an instruction was made by the defendant (see p. 76 of printed Record); and the refusal of that prayer is assigned as an error.

5. As the $15,000, styled in the charge a bonus, was not to become due until the first sixty miles of the road should be completed, and as this part of the road was not completed, and the plaintiffs were not prevented from completing it either within the contract time or afterwards, they show no right to this sum, or any part of it. But more is to be said of this in another place.

6. No money was to become due the defendants in error until an estimate or certificate of the Engineer of the Wisconsin Central Railroad Company, showing the amount to be due, should be furnished to the plaintiff in error. (See pp. 9 and 21 of printed Record.) The contracts are explicit in this regard, and go so far as to say that it is agreed that the decision of said Chief Engineer on any point or matter touching the agreement shall be final and conclusive between the parties, and that each and every of the parties waives any and all right of action, suit or suits or other remedy in law or otherwise under the contracts respectively or arising out of the same. (Pp. 9 and 20 of printed Record.)

Under such an agreement it was necessary for the plaintiffs, now defendants in error, to produce certificates or estimates of the Engineer in order to show that any moneys were due for work. In the absence of fraud or of a refusal to have the work estimated, such certificates were the only evidence on which the plaintiffs could claim money to be due for work or materials, and the obtaining of such certificates should have been treated as a condition precedent to any right to compensation for work or materials.

U. S. vs. *Robeson*, 9 Peters, 237.
Morgan vs. *Birnie*, 9 Bing., 754.
Canal Trustees vs. *Lynch*, 5 Gil., 321.
Monongahela Nav. Co. vs. *Fenlon*, 4 Watts & Sergeant, 208.
Sedg. on Damages, 4th Ed. [224.]

And there was no cause of action until such certificates or estimates were obtained.

President, Dir., &c., D. & H. Canal Co. vs. *Pa. Coal Co.*, 50 N. Y., 250.

7. If we concede that the declaration may be construed to be for money which was due December 15, 1872, then the estimates numbered 1473, 1474 and 1475, being for work done during the month of December, 1872, (see p. 53 of printed Record,) and not being payable until the 15th day of January, A.D. 1873, these estimates cannot be fairly said to have been declared upon or included in the declaration; since the declaration merely alleges that the defendant was on or about the 15th of December, 1872, indebted to the plaintiffs in a certain sum. It was therefore an error to include these estimates for the December work as being any part of the moneys covered by or referred to in the declaration, and the Circuit Court erred in embracing in the charge to the jury such estimates amounting to $10,042.05.

II.

What has already been said is in great part prefatory, and some of the same matters must be again referred to in considering the errors assigned in their order. These take up the case as it was progressing on the trial, and those of the earliest numbers pertain to the admission of testimony offered by the plaintiffs. Error No. 1 relates to the admission of the evidence given by plaintiff Alexander as to the cost of transporting men to the work from the date of the contract, to wit: July 18th, 1872, to the close of the work; and error No. 22 is also connected with the same subject.

In averring special damages in the declaration, the plaintiffs stated the first item thereof as follows: "The cost of hiring and transporting from Chicago to said Stevens Point, a large number, to wit: one thousand men, to work under said contracts *immediately prior* to their unlawful abrogation by the defendant as aforesaid, so that the plaintiffs wholly lost such cost," &c. (See p. 31 of printed Record.)

Under this clause of the declaration the plaintiffs proposed to prove on the trial, and by the testimony in question they were permitted to prove, that the cost to them of transporting men to the work *from* July 18th, 1872 *to the close of the work* was between $4,000 and $5,000. As this testimony was proposed to be given, the defendant, now plaintiff in error, objected thereto, insisting that the defendant was not to be charged with such cost, but the court overruled the objection, and decided to admit the testimony subject to be rejected by the court in charging the jury if on the whole case such testimony should be found to be immaterial or irrelevant; and under and subject to such objection and an exception of the defendant to the ruling of the court, plaintiff Alexander testified as has already been stated. (See p. 56 of printed Record.) The court afterwards in charging the jury decided to allow such evidence to stand, and the defendant by its counsel then and there excepted to that decision of the court. (See p. 72 of printed Record.)

1. With as good reason as can be assigned for the allowance of this amount, the cost of the meals and lodging of the employes of the defendants in error could be charged against the plaintiff in error. It is manifestly wrong to charge us with this item. The evidence reaches back to the very beginning of the contract between the parties, and seeks to idemnify the plaintiffs, now defendants in error, for all their outlays in transporting men to the work. Some of the men may have remained during the whole time from July 18th, 1872, to November 28th, 1872, and have given the benefit of their labor to the defendants in error, for the result of which the defendants in error now charge the plaintiff in error, and thus get probably a very large return for the original outlay; and yet the defendants in error seek a second return of this amount as a distinct and independent charge. Again, some of the men may have remained but for a few days at most after July 18th, 1872, and if the defendants in error were unfortunate in selecting men whom they could not retain upon the work, they would now charge the plaintiff in error with the consequence of that misfortune.

2. The evidence is also a departure from the allegation in the declaration, and was not justifiable under that allegation, which was that the plaintiffs were at the cost of hiring and transporting from Chicago some men *immediately prior to the supposed abrogation of the contracts* on which the plaintiffs relied; but here we have evidence allowed and retained by the court, as to the cost of transporting men to the work from the time the contract of July 18th, 1872, with the plaintiffs below was entered into until the plaintiffs suspended their work. It is believed that no justification of such testimony can be made.

The evidence did not support the allegation; and plaintiff Alexander admitted that plaintiffs did not put many men on the work in November, and perhaps not any after November 15th, 1872. (P. 57 printed Record.)

III.

The second error which has been assigned is that the court permitted said plaintiff Alexander to give evidence of the value of plaintiffs' tents on the line of their work from section 40 to section 60. The evidence on this subject came in under the circumstances last above mentioned. Afterwards, evidence on the same subject was offered by the defendants in error through the witness Quinn, and error No. 18 has been assigned with reference to the reception of his testimony in the matter. This testimony and other testimony of a similar character, which got in under the same circumstances, was made the basis of a part of the charge of the court, and errors No. 35 and 36 pertain to the same. No foundation for any such testimony seems to be laid in the declaration. If anywhere hinted at in the declaration, it is in the second matter of special damage alleged, which relates to the cost of erection by the plaintiffs along the line of the Railroad in the fall of 1872 of a large number, to wit: fifty houses, for the accommodation of their workmen during the then ensuing winter. (See p. 31 of the printed Record.) But here we have testimony received and force allowed to it by the court in the charge, not that any such houses were erected, but that the plaintiffs, now defendants in error, had *tents* along the line of the Railroad from section 40 to section 60 of a certain value! Suppose, however, that they did have them: why should they charge them to the defendant? They do not seem to have thought of doing so when filing the declaration. And again why should they be charged when they were on the line of the work from section 40 to section 60? According to the contract they should have been so effectually used before December 15th, 1872, and even before September 15th, 1872, that that part of the road would be fully completed. Yet the theory of the plaintiffs seems to be that at any later time they can charge us with the value of these tents, because of the non-payment of certain moneys claimed to be due the plaintiffs for work done.

IV.

The third error which has been assigned has reference to the testimony of the same witness (plaintiff Alexander) as to the worth or value of the log houses or wooden buildings on the line of the road between sections 40 and 60. He testified that there were ten of them, worth about $200 each, and the court so ruled, in allowing this testimony to stand, as to permit the jury to charge the defendant with the cost of these houses, except so far as the plaintiffs might have been able to sell the lumber on the ground after stopping the work. (See pp. 56, 72 and 76 of printed Record.)

Why should we be charged with these houses? They were below the point to which the plaintiffs ought to have completed their work by the 15th of December, 1872, and, when the plaintiffs failed so to complete their work within the contract time, they certainly lost any right to charge us with the cost of such houses, even if before then they could ever have found reason to make such a charge.

Then, again, those houses were but temporary, and probably of no special value to the plaintiffs or any other person. They served their purpose in accommodating the plaintiffs' laborers while the work was going on, and it may fairly be said that the plaintiffs were paid for them in the allowance for the work which was actually done and went into the estimates. This was the case beyond all question as to the completed part of the road, and it was largely, if not entirely so, as to that part of the road which was not fully completed, but for work on which estimates were made and paid up to November 15th, 1872, and included in the verdict so far as not paid. Besides all this, the allowance of pay to the plaintiffs for these houses put them upon a better footing than they could have been if the defendant had terminated the contract by notice, as it was permitted to do, a clause in the agreement of January 25, 1872, as above cited, giving to us in express terms the right so to terminate the contract. That clause may bear repetition in this connection. It is as follows: "It is further agreed

that this contract may be terminated by said first party upon giving thirty days' notice of such intention; and in such case the hay, grain and provisions of said second party on the work at the time of giving such notice shall be taken at cost by the said first party.

If the contract had been thus terminated, these houses could not have been charged for by the plaintiffs; but if they owned the boards out of which the houses were made, they could have taken them away; and why should they be put upon a better footing, when, having through their own default failed to complete that part of the road on which these houses were, they elected to bring a suit for work done by them under the contract? Certainly it was their own fault that they did not complete the road up to section 100 of the Middle Division by December 15, and have the work estimated in full.

The principle on which allowances such as that under consideration seem to have been made, is supposed to be that the plaintiffs did not get full profits from their contract, their performance of the same being cut short by financial inability on the part of the defendant, and that to make up a deficiency, they could call upon the defendant to reimburse them for any outlays on their part having a remote connection with the work.

But it is submitted that such a theory is unjust to the defendant, and introduces an element of damage that was not anticipated, but was even excluded when the contract was made; and this a claim, too, which originates because the plaintiffs, now defendants in error, were negligent in performing their work, and failed to accomplish it within the contract time.

V.

The fourth error relates to the ruling of the court in permitting the same witness, plaintiff Alexander, to testify as to the cost of the supply road from section 40 to section 76. (See p. 56 of printed Record.) The court, in charging the jury, allowed this testimony to stand as to the cost of the supply road beyond where the track was laid. (See p. 72 of printed Record; see also error No. 22.) And the

charge of the court allowed the jury to find against the plaintiff in error for the cost of this supply road above where the track was laid; that is, from about section 46 to section 76, and error No. 34 has been assigned as to the giving of this part of the charge.

The preceding observations apply largely as to this supply road. No real excuse is shown by the defendants in error for not having completed their work on the railroad up to section 100, by the 15th of December, 1872, as by their contract they were required to do. If they had so done, there is no pretence that they would have been entitled to anything on account of making the supply road. It seems, therefore, that they got this allowance because they were in default, and they got it notwithstanding they may have made such large profits upon the work they did as to be repaid over and over again for the cost of preparation in the way of making the supply road. Nor could the parties have contemplated that the cost of this supply road should, in the contingency specified in the declaration, be charged against us, especially as no such charge could have been made had we chosen to terminate the contract under the provisions allowing us to terminate it.

The fifth error assigned relates to the testimony of the same witness, to the effect that the buildings and supply road before mentioned became of no value to the plaintiffs; and what has already been said may be taken as applicable to that error.

VI.

The sixth error assigned has reference to the admission of testimony from the same witness as to the depreciation in worth or value of the horses, mules, wagons and harness of the plaintiffs by reason of the discontinuance of the work. That depreciation he claimed to be $3,252. (See p. 56 of printed Record.) It appears from the testimony that the plaintiffs sold their horses, mules, oxen, wagons and harness on the 26th day of December 1872, having given directions for such sale December 20th to December 25th, 1872, (see p. 60 of printed

Record,) and that the stock sold for about what it was worth for other uses than to carry on this Railroad work, but for less than it would have cost to replace it on the work, (see p. 61 of printed Record.) Error No. 15 has been assigned as to the evidence on this subject. Error No. 22 also pertains to the same matter, as does likewise error No. 36, specifying a part of the charge which has been objected to in this connection. It may be said to be a hundred fold more probable that the inability of the defendant to pay the estimates due November 15th, 1872, December 15th, 1872 and January 15th, 1873, is to be attributed to the failure of plaintiffs to complete 100 miles of the road by December 15th, 1872, than it is that the parties in making their contract could have apprehended that in the contingency supposed in the declaration the defendant would, under that contract, be charged with the depreciation of the plaintiffs' property. What reason, for example, had the defendant to suppose that the plaintiffs would not want to follow the business of Railroad contractors all their lives, and thus make this property useful to them in the future as it had been in the past? No notice seems to have been given to the defendant that it might take this property, nor that it might signify what disposition had better be made of it, nor yet that the defendant was to be charged with any loss resulting from the sale of it. But the plaintiffs appear to have sold it almost immediately after December 15th, 1872; and it is submitted that they might with as great propriety, charge us with the interest they paid upon bank loans or exchange on any drafts they discounted, as with any loss growing out of their sale of this property.

VII.

The seventh error assigned has reference to seventy barrels of cement which is alleged not to have been included in the estimates. This will be again spoken of hereafter as one of the prayers asked by the defendant pertained to it in part, and as an error has also been assigned with reference to the charge of the court concerning this cement, it is enough to say of it here that no reason is shown for not

having it embraced in the estimates, if indeed, it can be supposed that it was ever proper to have it included in the estimates.

The witness said it had not been included in the estimates. He did not say why it had not been so included, but the Chief Engineer, D. W. Wellman, who was a witness for the plaintiffs, testified it had been his design to estimate all the work of all kinds; that he ordered no cement upon the work, and did not remember that there had been any claim made to him for cement. He testified also that there had been no use for cement north of section 40, and that the instructions were that no masonry would be put in above section 40 without further direction, and hence that there was no use for cement (see p. 69 of printed Record). Here then we have a violation of the contract under which it was absolutely necessary for the plaintiffs to obtain estimates before asking pay for work or materials; and a charge was made against us without the matter being brought to the notice of the Chief Engineer, and in a case in which, if the matter had been brought to his notice, there is every reason to suppose he would have found the charge to be unjust.

VIII.

The admission of the testimony of plaintiff Alexander as to the $2,100 worth of ties which he claimed should have been included in the estimates for October or November, 1872, is objected to in the 8th error assigned, and also in the 22d error. This item, if just, was one of the matters which ought to have been brought to the notice of the Engineer for the purpose of having an estimate made upon it, and it was not right to allow the witness to put his judgment against that of the Engineer as to whether the item should have been included in the estimates. The witness testified it should have been so included, but under the contract the Engineer was the person to judge, and his judgment, according to the plaintiffs' own covenant, was to be the law of the case.

In *U. S.* vs. *Robeson*, 9 Pet., 326, the court said: "Where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained * * * the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so."

And in *Prest., &c., D. & H. Canal Co.* vs. *Pa. Coal Co.*, 50 N. Y., 250, the court, on a very full consideration, expressed a rule even more stringent.

IX.

The 9th error assigned has reference to the admission of the testimony of the witness Voak in regard to the goods, supplies, tents and tools of the defendants in error, alleged to have been taken away by the plaintiff in error March 6, 1873.

This witness was asked, among other things, to testify for the plaintiffs as to the groceries, flour, pork and other supplies which the plaintiffs had on hand November 28, 1872, and the defendant objected to the testimony, but the court decided to admit it, designing, as the bill of exceptions states, to exclude it from consideration in charging the jury, if upon the whole case it should appear to be immaterial or irrelevant. The defendant thereupon took exception, and the testimony of the witness, coming in under and subject to the objections and exception, tended to show that in certain cars of the Wisconsin Central Railroad Company, at section 46, there were goods, supplies, tents and tools of the plaintiffs when the work was suspended, and that such cars were taken away by defendant March 6, 1873, to Stevens Point, and the witness estimated that there was so taken away

property of the value of $5,532.38. (Pp. 59 and 60 of printed Record.) The defendant objected in apt time to the testimony in regard to bringing away the cars March 6, 1873, that it was not a ground for claim in this case, and also that it appeared that it was after the commencement of the suit. But the court decided that these objections were insufficient, and ruled that the testimony should be admitted, subject to be rejected in charging the jury, if on the whole case found to be immaterial or irrelevant, and the defendant preserved an exception to this ruling of the court, which exception is intended to be presented by the same 9th error. (See p. 60, of printed Record.)

The further history of this property, as given in the Record, is that witness told defendant's agent Rhodes, when the latter proposed to take said cars away March 6, 1873, not to meddle with the goods; also that he declined to let defendant have the cars, and declined to take the plaintiffs' property from the cars; whereupon said Rhodes took the cars with the goods therein to Stevens Point. The evidence also tended to show that the sheriff had taken under attachment commenced by John Hayward against the plaintiffs, some of these goods, which were put from these cars into a warehouse at Stevens Point. (P. 60 of printed Record.)

Rhodes, in his testimony, said that Voak, who was acting as agent for the plaintiffs, would not consent to have the goods taken out of the cars; that witness asked Voak to remove the goods from the cars, and Voak refused, and thereupon the witness brought the cars with such goods therein to Stevens Point, and put the goods in a warehouse there, and that a part of them were still in the warehouse at the time of the trial, and that others had been taken by the sheriff of Portage county, Wisconsin. (See pp. 63 and 64 of printed Record.)

A further notice of the same matter will be given when we come to the prayers for instruction on the part of the defendant; but it should here be said that no hint of any claim on the part of the plaintiffs for

this property was given in the declaration. Indeed it was not even possible to give any such hint, because the occurrence of the removal of the cars happened over two weeks after the suit was commenced, and was not then one which would tend to support the action of covenant.

The history which seems to be revealed by the evidence on this subject is that the plaintiffs retained possession of the defendant's cars for some purpose or other, until after they began this suit, and that thereafter on the 6th of March, 1873, when the defendant wanted its cars, and Rhodes, as agent for the defendant, went to get them, he found Voak, the plaintiffs' agent, in possession of them at section 46, which was the end of the track, and that Voak refused to give up the cars, and refused to take out the property, as perhaps he could not very well do in a wilderness, and Rhodes was under the necessity of bringing the plaintiffs' property away with the cars, that he might store it for the plaintiffs' account rather than throw it out in the woods where it might be absolutely lost.

There does not seem to be any reason whatever for the admission of this testimony which tended to charge the defendant with this property.

Errors No. 10 and 11 have reference to similar matters, error No. 10 relating to scattered tools of the plaintiffs, as to which the witness Voak testifies under the same circumstances, and error No. 11 pertaining to a part of the goods so removed with defendant's cars to Stevens Point, March 6th, 1873.

Error No. 12 relates to the admission of testimony of the same witness as to the value of the buildings and lumber of the plaintiffs on the line of the work scattered from section 40 to section 60. What has already been said about the evidence as to the tents and buildings of the plaintiffs on that part of the line applies to this error.

Error No. 13 points to the admission of testimony on the part of the plaintiffs tending to charge us with services and salary of the witness

Voak for taking care of the property of the plaintiffs. His testimony on this subject came in under and subject to our objection and exception, and tended to make a charge against us of $288.86, his charge being $150 per month and board. (P. 60 of printed Record.)

This evidence was put before the jury by the court in the charge in a form which will be presently noticed in speaking of another error assigned, and further observation in respect to this matter is deferred until that point in the case shall be reached.

The 14th error assigned has reference to the admission of the testimony of the witnesses Voak and Wellman, as to the character of the season for carrying on the work which the plaintiffs undertook to do. (See pages 60 and 61 of printed Record.)

It is so well settled that when a contract requires work to be done by a certain time, the state of the weather will not excuse the party from complying with his contract, that authority to that effect, will not be needed nor called for; and such being the case, the admission of this testimony was palpably wrong.

The 15th error has reference to the reception of the testimony as to the sale by the plaintiffs of their stock after the suspension of the work. (See pages 56 and 61 of printed Record.)

Claiming, as we do, that this stock was not supplied on our account, and that we could not have any reason to suppose that we would be charged with it, we cannot see any justification for the charge of any loss arising from the sale of it; and it is therefore submitted that the court erred in receiving it as it did, as proper to form a charge against us. (See page 61 of printed Record; p. 184 of manuscript Record.) It would have been equally fit to have charged us with the plaintiffs' loss on any other property.

X.

The 16th error assigned pertains to the admission of evidence given by plaintiff Alexander, tending to show an alleged special verbal arrangement between himself and Phillips, of the defendant Company, for the allowance of an extra amount, *over and above, and in addition to, the estimates*, for handling the earth by train. This matter is fully detailed on pages 62 and 63 of the printed Record. It there appears that in the course of the examination of the plaintiff Alexander, it was proposed by the plaintiffs' counsel to prove by him that "the plaintiffs were entitled to charge a certain sum *over and above, and in addition to, the estimates,*" *for the cost of handling the earth at certain points where the ground was low and wet*, particularly about section 42 and section 46, it being thought that the earth could not there be handled with advantage by the use of teams. The defendant, by its counsel, objected to any testimony on the subject, urging that if it was a matter of special contract, independent of the contracts declared on, or outside of the same, it was not proper to introduce it in this action; and also, further urging that it ought to have entered into the estimate if it was a proper matter of charge, and could not be introduced under the circumstances without having been passed upon by the engineer and embraced in the estimates; but the court overruled each and every of such objections, and decided to admit the testimony, and the defendant excepted. The testimony of plaintiff Alexander coming in under such circumstances was to the effect that on a certain occasion Phillips, having passed over the ground with him, agreed that the earth should be taken out with a train, provided the Engineer came to the conclusion that it should be so done, in which case the train was to be sent up, and that Phillips said that whatever the cost was, he, meaning the defendant, would pay the plaintiffs; after which conversation the Engineer, Wellman, told witness that Phillips had directed him to make such arrangements as he deemed advisable to expedite the work at those cuts, and Wellman proposed to give plaintiffs all the waste and borrow, and also, if the defendant consented, to furnish an extra train.

The witness Alexander stated that the train was furnished by the defendant after that conversation of Wellman, and the plaintiffs kept an account of the extra cost of taking out the earth in that way under said arrangement, and that the extra amount beyond what it would have cost to take it out by the ordinary method used on the line was $11,708; that Phillips, when on the line, speaking about this mode of doing the work, had expressed an anxiety to have the work expedited; that some corduroy was saved to defendant by having the work done in this way; that when the estimates were afterwards made, witness Alexander remarked to Wellman, the Engineer making the same, that Phillips had made such arrangement, and that Wellman said he could not allow the extra expense, as it was a matter between Alexander and Phillips, and must be settled between them, and so this item was not embraced in any of the estimates.

Wellman, in his testimony (see p. 69 of printed Record), stated that he estimated on the work that was done by train, and that it was included in the estimates introduced in evidence, as above stated; the excavation made by train, as well as otherwise, being so included; it having been his design to estimate all the work of all kinds. He further testified that he had no data from which to make an estimate of the actual expense of doing the work by train. (P. 69 of printed Record.) Phillips, in his testimony, denied that he promised that defendant would pay the cost of doing the work by train, and said that he left it to Wellman to go up and make arrangements with Alexander as to the mode of doing the work. He further said that for the contractors, the cheaper way to expedite the work was to use the engine, and that as they got the waste and borrow both ways, and the use of the train, it was not more expensive for them to do the work in that way.

On the testimony of the witness Alexander, however, the jury brought in a special verdict for $11,708 on account of the extra cost of doing the work by train. Brief reference will be made at a later stage to the instruction of the court in this matter, but it is now sub-

mitted that it was without precedent or authority to permit the witness Alexander to testify to any such special arrangement as he alleged.

1. No matter of this kind was referred to in the declaration. In reading it over, we find that it sets forth the contracts of September 7th, 1871, January 25th, 1872, and July 18th, 1872, but does not set forth any such special arrangement as is now pretended, nor do any of its expressions indicate that any such charge would be made against the defendant.

2. The testimony it was claimed tended to show that a special arrangement was made for an allowance of extra cost over, above and beyond the estimates; and it was so construed by the court. It was, therefore, not even left within the power of the Engineer to pass upon this matter; for it was to be distinct from the items upon which he was to act. The agreement pertaining to it was, then, outside of and excluded from, the written contract between the parties. That written contract in unmistakable terms, so often repeated that they cannot be overlooked, placed the Engineer between the plaintiffs and defendant as an umpire to consider the work done, and to make allowances for it at the contract rates; and also so made it a condition precedent to any right of claim on the part of the plaintiffs for work done or materials provided that estimates should be obtained, that any agreement thereafter grafted upon it, dispensing with the office of the Engineer, or taking away his power to make estimates, or excusing the plaintiffs from getting his estimates, would make a most radical change in some of the most distinct features of the writings in suit. But here we find that testimony was received by the court *of a special verbal arrangement for an allowance over and above the estimates*, excluding the Engineer from any participation in considering what would be the proper amount, and making plaintiffs' book-keepers the umpires, by allowing them to write down what they considered to be the extra cost. As we have before seen that this action cannot be sustained upon parol testimony, so now, when we observe that *this special arrangement*, as it is called, is one that so diverges from the written contract as to be so

clearly outside of it, and necessarily provides a different method of ascertaining the charge, it was most clearly erroneous to admit the testimony in question.

The effect of the testimony was to substitute as to the work in question a different contract from the one in writing, and this could not be done; not at least in this action. *Goss* vs. *Lord Nugent*, 5 Barn. and Adol. 58.

XI.

The 17th error assigned has relation to the admission of testimony given by plaintiff Alexander, tending to explain away some letters or notices which were sent by Chief Engineer Wellman to the plaintiffs, in August, 1872, requiring an increase of force upon the work. These letters are given at pages 57 and 58 of the printed Record, and they show that a large increase of force was required, and that the defendant even contemplated the necessity of providing such a force at its own expense, and charging the cost of the same to the plaintiffs, according to the provisions of the contract of July 18, 1872.

The testimony in question was offered on the part of the plaintiffs, as tending to explain away those letters. The defendant objected to the admission of such testimony, and urged that it was entitled to the benefit of the letters as speaking for themselves. The court overruled the objection, and permitted the witness to testify and give his explanation, which was to the effect that he spoke with the Engineer, Mr. Wellman, of writing such letters, and wished him to do so, and to have him make the letters strong so that witness could use them with his subcontractors, to make them increase their force.

Injustice was done the defendant by the admission of such testimony. It was of a character similar to that relating to the weather, and its admission, harmonizing, however, with other rulings, which will be observed on examining the Record, went towards the deprivation of just defences which the defendant had as to a great part of the plaintiffs' claim.

XII.

The 18th error has reference to the admission of the testimony of the witness Quinn, set forth at page 63 of the printed Record. He was called upon by the plaintiffs to testify as to the value of the houses, tents and lumber which had already been spoken of by the witness Voak on the part of the plaintiffs under objection and exception, as before stated; also as to materials claimed not to have been included in the estimates, and certain houses on section 23, and as to labor on a side-track on section 40, and certain freight claimed to have been paid by the plaintiffs. The defendant objected to the proposed testimony, but the court overruled the objection, and the defendant excepted, and the witness was thereupon allowed to give his testimony by stating the value of the lumber, tents and log houses at $603.88, and introducing an account of items as an answer in reference to the other matters called for, and to the giving of evidence upon which the defendant had objected, which account amounts to $3,367.69, includes freight-money paid, a charge for labor on a side-track at section 40, houses on section 23, and ties to the amount of $2,167.25, among other things.

All this testimony was incompetent. So far as it pertained to freight, no foundation was laid for it in the declaration. As to the labor on the side-track, and other work, and the materials and ties, it should not have come in without an estimate, or an excuse for not having it estimated. As to the houses on section 23, no reason why they should be charged to the defendant is perceptible. The work up to section 40 had been done and fully paid for. Then why should the plaintiffs go back to section 23, and charge us for these houses? It seems that the ties were merely to replace some that had been furnished by the defendant, but which ought to have been furnished by Hopper, Boyle & Co. But this being so, the plaintiffs having assumed all the obligations of Hopper, Boyle & Co., should not be allowed to charge the defendant for the delivery of such ties; or if

they were chargeable at all, they would not come in under the contract in suit, but should have been made the basis for an action in another form.

XIII.

The 19th error assigned has reference to the exclusion of the testimony offered by the defendant to show its pecuniary ability. The defendant was about to show what arrangements it had made in regard to negotiating securities immediately prior to the Boston fire of November 9th and 10th, 1872, and also to inquire of the witness Charles L. Colby, who was a stockholder in and director of the company, as to the money and funds of the company, after November 1st, 1872, and prior to the institution of the suit. But the court, on request of the plaintiffs' counsel, excluded the testimony, and ruled that it made no difference how much funds defendant had, for that the question was, whether defendant paid or not. (See p. 67 of printed Record.) The testimony in question went to contradict the allegation in the declaration that the defendant was, on the 15th of December, 1872, and thenceforth until the commencement of the suit, insolvent, and would also have tended to support defendant's 6th plea, which directly denied that defendant was insolvent. (See pp. 35 and 36 of printed Record.) It is therefore submitted that such exclusion was an error. If there was a disability on the part of the defendant, and it ceased before the suit was commenced, it was, on general principles, especially in view of these contracts, competent to show that such disability ceased. *Heard* vs. *Bowers*, 23 Pick. 455.

XIV.

The 20th error has reference to the ruling of the Circuit Court holding to be immaterial the objection made by Messrs. Phillips and Pratt in behalf of the defendant company as to the slowness of the progress of plaintiffs' work. (P. 70 of printed Record.) Pratt in his testimony stated that as Phillips was about making payment of the balance due plaintiffs for work from sections 1 to 40 inclusive, which was on or

about October 15th, 1872, Phillips called this witness into the room in which plaintiff Alexander was with Phillips, and that Phillips then in the presence of this witness told Alexander that the payment on account of the work north of the first 40 miles was under protest, and that defendant reserved its rights under the contracts. (P. 64 of printed Record.) Phillips in his testimony stated that this protest by him was made when final payment for the work up to Section 40 was made, and before the check was passed; that Alexander made no reply but rather laughed about it, and asked what witness meant or something of that kind, and witness thought the matter did not make any deep impression on Alexander's mind at the time, but yet that it was not a joke on the part of the witness. (See p. 69 of printed Record.) This testimony, like that conveyed by the letters of Chief Engineer Wellman, before referred to, tended to show that the defendant did not assent to the slowness of the plaintiffs' progress, and did not acquiesce in the breaches of the contract on the part of the plaintiffs, and it tended to disprove the theory of such acquiescence, on which the case was put by the court to the jury, and therefore it ought to have been received.

XV.

1. Some further notice of the prayers for instruction on the part of the defendant, so far as not already commented on, is called for. The second of these prayers (see p. 70 of printed Record) is as follows: "That if the jury believe from the evidence that the estimates for September, payable on or about October 15, 1872, were paid under protest, objecting that the plaintiffs were not duly complying with their contracts, such payment would not be any waiver of the right of defendant to insist upon having the work done within the stipulated times as a condition precedent to the payment therefor."

This instruction was based upon the testimony of Phillips and Pratt as to a protest which has been already noted, and it is submitted that it was not only an error to exclude that testimony, but also an error to refuse this instruction.

2. The fourth instruction asked for by the defendant was as follows: "If the jury find from the evidence that after the 15th day of November, 1872, plaintiffs acquiesced in the non-payment of the estimates ordinarily payable on or about that date, and, notwithstanding such non-payment, proceeded with the work on the Railroad as before, that was a waiver on their part of any such default by defendant, and after said date plaintiffs had no right, without some fresh default on the part of defendant, to voluntarily abandon the work and claim any damages unless for actual work done." (Pp. 70 and 71 of printed Record.) This instruction would have been in accord with the testimony, to wit: that the plaintiffs had no other excuse for the stoppage of the work by them than that the estimates payable on or about November 15th, 1872, were not paid; and that being the only excuse, it is and will be maintained that there was no prevention of performance interposed by the defendant, and therefore, the plaintiffs having suspended work merely because of the non-payment of the estimates for the October work, all they could, at the utmost, have a right to recover, would be for work actually done. The cases of *Palm* vs. *Ohio & Miss. R. R. Co.*, 18 Ill., 217; *County of Christian* vs. *Overholt et al.*, 18 Ill., 233; and *Kinney* vs. *Sherman*, 28 Ill., 520; are well considered cases sustaining this proposition, which, it is submitted, cannot be successfully answered.

In the first of these cases, Caton, J., delivering the opinion, said that after diligent search he "had found no case where the plaintiff had been allowed to recover for losses sustained by not being permitted to complete the contract, unless he had been prevented from going on with his work by the positive affirmative act of the other party, or where the other party has neglected to do some act without which the plaintiff could not in the nature of things go on with his contract, as where he refused to furnish a place whereon to erect a building, or to furnish material which by the contract was to be put in the works, and which was to be provided by him." * * * "But [he adds] nowhere have I found a case where the failure to pay the consideration for the work as it progresses, according to the terms of the

agreement, has been held such an act or omission on the part of the defendant as to prevent the other party from completing the contract." * * * "When money becomes due upon the partial completion of the contract, it is difficult to say that it is any more than so much money due the party, and which ought to be paid to enable him to complete that *or some other enterprise*, as his interest or inclination may dictate." (Pp. 220 and 221 of 18. Ill. Rep.)

These cases will be found to be pertinent in respect to other matters, and sufficient in themselves to exclude the whole claim of the plaintiffs except so far as it is for work actually done.

3. The fifth instruction asked by the defendant was as follows: "If the jury believe from the evidence that the first default was on the part of the plaintiffs, and that after the defendant failed to pay the estimates for the October work, due on or about November 15th, 1872, the plaintiffs acquiesced in the excuse or reason, if any, given by the defendant for the non-payment thereof, and did not give notice or permission to the defendant to take charge of the supply road or other things now sought to be charged for by the plaintiffs as having been prepared by them in order to complete the work, the plaintiffs should not be allowed any compensation for such supply road, houses or other things, except so far as the same may have been included in the estimates." (P. 71 of printed Record.) It is submitted that this instruction ought to have been given, in any view that can be taken of the case. Under the contract of January 25th, 1872, which related to all the work above section 40, a provision already quoted herein gave the defendant the right to terminate the contracts absolutely upon giving 30 days' notice, and in such case nothing but the hay, grain and provisions of the contractors would have had to be paid for by the defendant. Why, then, if the plaintiffs chose to suspend their work under the contract merely because the defendant did not pay the estimates for the October work, should the defendant be charged with the supply road, houses or other things prepared by the plaintiffs, when the plaintiffs did not either give notice or permission to the defendant to take such

things? The instruction would have left it to the jury to say whether such notice or permission was given by the plaintiffs; and the testimony, to some of which reference has already been made, tended to show that the plaintiffs neither gave such notice nor such permission. The position of the plaintiffs was that they kept possession, and kept their men on the track, though not at work after November 28th, 1872, until the wages of the men had to be paid by the defendant, December 19th, 1872, and then the plaintiffs sold off their stock, and gave no notice whatever to the defendant, that they would ask the defendant to take the supply road, houses, tents and lumber and make use of them.

It would be eminently unjust to charge the defendant with these things when the plaintiffs did not even give permission to the defendant to take possession of them at a time when possibly they might have been availing to the defendant to some extent.

The tenth prayer asked by the defendant is closely analogous to the prayer last quoted. Said tenth prayer was as follows: "If the jury believe from the evidence that the defendant kept and performed its covenants and agreements up to the 15th day of November, A. D. 1872, and paid all moneys due from it to the plaintiffs upon estimates payable prior to said time, and that on said day defendant was in no default; and the plaintiffs were, on said 15th day of November, in default as to the performance of the agreement on their part in not having eighty miles of the road completed, and in disobeying orders of the Engineer to furnish an adequate force to complete the different sections of the road; and if the jury further believe from the evidence that the plaintiffs permitted the work to be suspended about the last day of said month, and that the reason of such suspension by the plaintiffs was merely the fact of the non-payment of the estimates payable on or about November 15th A. D. 1872, this was not such a prevention by defendant, or hindrance to the plaintiffs, as would permit the plaintiffs to charge the defendant for the supply road, houses, or cost of preparation below section 80, which should have been completed by that date." (Pages 71 and 72 of printed Record.) This prayer was

as favorable for the plaintiffs as, under the contract, their case could be put, and the refusal of it by the court, followed by instructions quite positively charging the defendant with such supply road, houses, and cost of preparation, was manifestly wrong.

4. The sixth instruction asked by the defendant was in these words: "That by the terms of the contracts in evidence, any work done by the plaintiffs was to be estimated by the Chief Engineer of the Wisconsin Central Railroad, and said Engineer was made an umpire to decide all matters arising or growing out of the contracts; and the plaintiffs are, as to the work done by them, and materials for the same provided, limited to the amounts estimated and stated in these estimates by such Engineer, which estimates have been received in evidence, and defendant was under no obligation to pay for work not included in such estimates. (Page 70 of printed Record.)

The twelfth instruction asked, although it pertains to but a single matter, is akin to the one just quoted, and is therefore now given. It was as follows: "The claim of the plaintiffs for 70 barrels of cement should not be allowed to them; for if it was proper that the same should go into the estimates, it was plaintiffs' duty to bring the matter to the attention of the Engineer, who had full power to pass upon the claim, and if the plaintiffs failed to call upon the Engineer to make such estimate, or if they called upon him and he declined to allow for the same, in either case the plaintiffs are not entitled to recover for such cement." (P. 70 of printed Record.) The refusal of these instructions indicates the laxity of doctrine which was applied in allowing plaintiffs, as has already been observed, to prove the price of ties not estimated, the amount of work done on a side-track at section 40, the supposed extra cost of doing work by train, &c.; which laxity it will be seen further on prevailed in so charging the jury as to permit them to go beyond the estimates, and treated the estimates as but a mere matter of convenience in fixing amounts.

It seems, however, to be very clear under the contracts and in view of *Pres., &c., D. & H. Canal Co.* vs. *Pa. Coal Co.*, 50 N. Y., 250; *U. S.* vs. *Robeson*, 9 Pet., 319, and other like authorites above cited with reference to the necessity of obtaining estimates in such cases, that the court ought not to have refused the prayers 6 and 12 above cited.

5. The ninth prayer of the defendant was as follows: "The sum of $15,000 was payable by defendant on the completion of the first sixty miles of the road, if done according to the contract, but as this part of the road has not been completed, and the contract time for completion thereof was on or before September 15th, 1872, plaintiffs are not entitled to recover said $15,000, or any part thereof, if the jury believe from the evidence that they were guilty of the first default, and that their only excuse for the non-completion of the third section of twenty miles of road is the non-payment of the money for work done in October and November." (P. 71 of printed Record.)

The defendant never agreed to pay this sum of $15,000 until the first sixty miles of the road should be fully completed (p. 4 of printed Record). There being therefore no agreement on the part of the defendant to pay this $15,000 before the completion of the first sixty miles of the road, and such completion having never occurred, there was no reason for requiring the defendant to pay this sum, more especially if the plaintiffs were themselves guilty of the first default, and had no other excuse for the non-completion of the third section of twenty miles of the road than the non-payment of the money for work done in October and November. They ought by the terms of the contract to had said sixty miles of the road completed by the 15th of September; and as this was a sum in gross, the plaintiffs were under obligations to complete said 60 miles of road before they could ask payment of it. They were not, under the circumstances stated in the prayer just now cited, entitled to any apportionment of this sum, for no part of it was to be payable until the whole sixty miles should be completed, and *a fortiori* they were not entitled to all of the amount.

The completion of the sixty miles was a condition precedent first to be performed by the plaintiffs, and if we should concede or adopt the theory which they will suggest to enable them to maintain the action at all, to wit: that the moneys were *some of them* payable from month to month, so that as to these moneys the contract may be said to have been divisible, yet this particular sum cannot be found to be due, because it was not divisible. Therefore, if they should be able to satisfy the court that they as the parties first in default could recover for work actually done, there would still be no authority entitling them to the payment of this sum of $15,000.

6. The eleventh prayer of the defendant was as follows: "The jury are instructed that there can be no recovery against the defendant for the amount or value of any goods brought down upon the line of the Railroad to Stevens Point after the beginning of this suit, whoever ordered it, because whatever may be the liability of the defendant for such act in another form of action, such matters form no element of damages for breach of covenant in this action." (P. 72 of printed Record.)

It will be remembered that the testimony of Voak as to the removal of the cars of the defendant from section 46 on the 6th of March, 1873, to Stevens Point, came in under objection from the defendant, and that the defendant claimed that such removal was not a ground for claim in this case, and also urged that it appeared that it was after the commencement of this suit; but all the objections of the defendant were overruled, and the defendant excepted. (See p. 69 of printed Record; pp. 181 & 183 of manuscript Record.)

The prayer now cited was intended to counteract the admission of such testimony, and the refusal of that prayer by the court, left it to the jury to charge the defendant in an action of covenant with the value of personal property estimated at several thousand dollars, that had no necessary connection with the contract; that is, with property that was necessarily brought away by defendants' agent to save it from being

destroyed in the wilderness; that was so brought away merely because the defendant wanted its cars, and that did not benefit the defendant in any way. The points suggested in the prayer that the bringing away of the property was not alleged to have occurred until after the bringing of the suit was no less fatal to this claim on the part of the plaintiffs than is the other point that no recovery for such property could be had in this action.

7. The thirteenth prayer on the part of the defendant was as follows: "The defendant is entitled to have set off to it, or deducted from the estimates, such sum as the jury may find from the testimony to be due the defendant for damages for delay of plaintiffs in not completing the third section of twenty miles of the road, on or before the 15th day of September, A. D. 1872, the fourth section of twenty miles on or before the 15th day of November A. D. 1872 and the fifth section of twenty miles on or before the 15th day of December, A. D. 1872, such damages to be based on a fair value of the use of such completed sections of Railroad from the respective dates of the completion according to the contract down to the institution of this suit." (P. 72 of printed Record.) The refusal of this prayer was supplemented by a charge from the court ignoring and denying any right on the part of the defendant to claim damages, the court discarding the defendant's testimony tending to show the amount of such damages. (P. 80 of printed Record.)

Much use may be made by the plaintiffs of the case of *Phila., Wilmington & Balto. R. R.* vs. *Howard*, 13 Howard, 307, as tending to show that they were entitled to maintain this action; but an examination of that case will reveal important distinctions between it and the present case, and will also show that it is a strong and unanswerable authority for us in respect to our right to recoup or have deducted from the estimates and the retained percentage the damages which accrued from the plaintiffs' default. Under that case, therefore, the refusal of said thirteenth prayer was an error.

XVI.

Error No. 22 relates to the ruling of the court in finally allowing to stand the testimony before noticed as to the cost of transporting men to the work, the cost of erecting houses, sheds, shanties, stables and shops along the line of the work, the cost of the supply road beyond where the track was laid, the cost of taking care of the tools, teams and property after the stoppage of the work, the depreciation in value of the tools, teams, &c., on the work up to the time of the stoppage of the work, the consumption of supplies, and the value of ties said not to be included in the estimates. It is believed that sufficient has already been said in calling the attention of the court to this testimony, to show that neither upon general principles nor under the contract governing the case should it have been received.

The twenty-third error points out another matter which should have been noticed further as to the charge against the defendant for personal property in which the plaintiffs claimed an interest. Hopper, one the plaintiffs, sold out his interest under the contracts and in all the property in question as early as the 17th of October, 1872. (P. 57 of printed Record.) It was objected to the evidence tending to charge the defendant with this property, that it appeared that said Hopper, one of the plaintiffs, had no interest therein at the time of the stoppage of the work or subsequently; but the court held this objection to be immaterial, and overruled it, and the defendant accepted. (Pp. 72-3 of printed Record.)

Here, then, we have a joint recovery by four plaintiffs of many thousands of dollars on account of personal property in which but three of them had any interest. The fact throws some light on the character of the claim, which in itself is so foreign to what is just, and so much outside of the contract, that it seems hard to imagine what plausible theory to support it can be presented. It is true enough that as long as the plaintiffs were some of them using this property in carrying on the work, it was immaterial to the defendant whether it belonged

to them or any of them, but when the defendant is asked to pay for it, then it becomes material to see who owned it, and if the plaintiffs did not own it, they have no right to ask such pay; or if only three of them are the owners of it, they alone are the parties who could suffer any damage with reference to it, and consequently it would be for them alone to ask any such damages or other allowance for the property.

XVII.

1. Errors No. 24, 25 and 26 indicate certain parts of the charge in which the court stated the grounds for sustaining the action, and to some extent the view under which the defendant was excluded from being allowed any recoupment or set-off. The court held that if the defendant recognized the contract as in force after the plaintiffs were in default in not completing certain parts of the road within the stipulated times, such recognition estopped the defendant as it were, from subsequently setting up that default, or amounted to a waiver on the part of the defendant of any such breach or short-coming on the part of the plaintiffs. The court in these parts of the charge further held that if when the defendant was alleged in the declaration to have broken the contract, the plaintiffs were with the consent of the defendant engaged in fulfilling and performing it, then the defendant had waived the defaults on the part of the plaintiffs, and the jury would be justified in finding the issue on the fifth plea for the plaintiffs; and as to the alleged breach by the defendant, the court charged the jury that if on or about December 15th, 1872, the precise date not however being material, the defendant gave plaintiffs to understand that defendant was unable to pay the estimates then due, and that it was uncertain or doubtful whether it would be able to pay future estimates for work, the jury would be justified in finding that the alleged breach by the defendant was proved.

Some observations have been made under Point I with reference to these parts of the charge, and not much need be here added. It appears, however, that this part of the charge overlooked a part of the

burden which the plaintiffs took upon themselves by their replication to the 5th plea. In that replication they averred that the defendant had excused any supposed omissions on the part of the plaintiffs to perform the work strictly in accordance with the estimates of the contracts, and further that the plaintiffs at the time of the prevention and absolution by the defendant were prosecuting the work with such vigor and means as would have enabled the plaintiffs to fully complete the work within the time limited by the contracts. The court held, then, that the mere acquiescence on the part of the defendant in permitting the plaintiffs to proceed on and after September 15, 1872, when the third section of twenty miles of the road should have been completed, should be taken as having excused the omission of the plaintiffs to have that part of the road done by that time, and so as to the two next sections of twenty miles each, which ought to have been done by November 15th and December 15th, 1872, respectively; and this in the face of the letters of the Chief Engineer requiring an increase of force, and the protest of Phillips, made October 15th, 1872, with reference to the plaintiffs' delay.

But the court also in these parts of the charge held it to be immaterial whether the plaintiffs were in fact prosecuting the work with such vigor and means as would have enabled them to complete it within the time limited by the contract. The plaintiffs could not have proved that allegation in their declaration, because the evidence showed that they did not have men enough or teams enough on the line to complete the whole work within the contract time. (See admission of plaintiff Alexander, p. 57 of printed Record, p. 174 of manuscript Record.) This witness, plaintiff Alexander, merely expressed it as his thought that without unreasonable trouble or expense a sufficient supply of teams and men to complete the work prior to October, 1873, *could have been obtained*, if the defendant had paid the estimates.

It cannot, therefore, be said to have been a fact that the plaintiffs proved their replication, even if the evidence sustained the theory suggested in this part of the charge. But it is submitted that the plain-

tiffs ought to have been held in pleading and in proof to the necessity of showing that they were, in fact, ready to complete the contract according to its terms, or within the contract period; for without such allegation and proof, it would not appear that they had any right to complain of the defendant, especially in an action of covenant.

It may also be suggested here that in *Phila., Wilmington & Baltimore R. R. Co.* vs. *Howard*, 13 Howard, 307, there were positive and negative breaches on the part of the R. R. Co. which justified the plaintiff Howard in alleging that he was wrongfully prevented by the R. R. Co. from completing his contract. For instance, the R. R. Co. failed to provide Howard with a place to deposit the waste earth. It also permitted an injunction to prevent him from going on with the work, which injunction was sued out before the time for fulfilling his contract had arrived, and remained in force for a long time thereafter; and the Railroad company finally annulled the contract with him, either for the purpose of having the work done cheaper, or for the purpose of oppressing and injuring him. It is not contested that in such a case, an action of covenant could be maintained, because the plaintiff was not in fault, and the defendant was in default. But the case here is different. The first breaches are on the part of the plaintiffs, and the defendant did not in any way prevent the plaintiffs from proceeding with their contracts.

2. The 27th and 28th errors question the correctness of certain parts of the charge, allowing the jury to go beyond the estimates in allowing for work done and materials provided, and also question the propriety under the declaration of allowing to be included the estimates made for December work, which estimates were payable on or about January 15th, 1873.

(*a*) The authorities cited *supra*, as to the necessity of obtaining estimates as a condition precedent to any claim on the part of the contractors for work or materials, need not be again referred to. The case of *Canal Trustees* vs. *Lynch*, 5 Gil., 521, among others, shows

that the Engineer's estimates were the only evidence that could be received in the absence of fraud, of which there was no pretence. This view of the matter had, however, been denied by the court on the trial (see p. 62 of printed Record), and was again overruled, in refusing the 6th and 12th prayers for instruction on the part of defendant; and the part of the charge now referred to again adopted what is submitted to have been an erroneous view of the contract, in holding it to be merely a matter of convenience, and no wise a matter of necessity, to obtain estimates as to work and labor. But *Morgan* vs. *Birnie*, 9 Bing. 754, will show that stipulations requiring estimates cannot be dispensed with so lightly.

The loose construction to which objection is now made let in matters which, to say the least, were highly questionable, such as the claim for Railroad ties not estimated, the claim for a side-track at section 40, and the claim for seventy barrels of cement, to say nothing at present of the very singular claim for the alleged extra cost of moving the earth by train, which last mentioned claim could not be said even upon the theory on which it was presented by the plaintiffs, to have been expected to be estimated for according to the terms of the contract.

(*b*) Sufficient has perhaps been said with reference to the impropriety of allowing the estimates for December work to come in under the declaration, inasmuch as upon the most favorable construction that can be given to the declartion, it does not allege that any money became due after December 15th, 1872; and of course the money under the estimates for December did not become due until on or about January 15th, 1873. Nor need the rule that the pleading of a party is construed most strongly against him be invoked.

3. What might be here said as to the $15,000 styled by the court a bonus to be due on the completion of the first sixty miles of the road has been largely anticipated. But it is to be remarked further that the part of the charge brought into question by the 29th error assigned made it necessary for the jury when that part of the charge was con-

nected with what went before it, to find for the plaintiffs as to this $15,000, although the plaintiffs never completed said sixty miles of the road, and were never prevented by the defendant from completing the same; and the jury were not left at liberty even to make any deduction from the $15,000, notwithstanding it appeared from the declaration, and was also indicated by the proof, that said sixty miles of road could not have been completed by the plaintiffs *at the contract price* without loss. (See p. 30 of printed Record; p. 89 of manuscript Record.) It is deemed impossible to extract from the contract of July 18th, 1872, any promise on the part of the defendant to pay said $15,000 until said sixty miles of road should be completed. The promise was in terms to pay the "sum of $15,000, *when the first sixty miles of said road shall be fully completed as herein and in said contracts provided.*" And the defendant's covenant extended no further than that.

4. The 30th error assigned relates to that part of the charge which allowed the jury to find against the defendant for the retained percentage of $19,937.55. This retained percentage was payable partly in Portage county, Wis., bonds at ninety per cent. of their nominal value as often as sixty consecutive miles should be completed, after finishing the third section of the middle division. (See p. 22 of printed Record.) And by the contract of July 18th, 1872, the whole amount of it was to be left in the hands of the defendant, and held by it as additional security for the performance of the contract, and to be forfeited to the defendant and applied towards the payment of any claim for damages for failure by the plaintiffs to have the work of construction of the road completed in the time specified. But this part of the charge of the court so far ignored these provisions of the contract as to exclude the right of the defendant to make such payment in Portage county bonds, and deprive the defendant of any recoupment or set-off for damages on account of the plaintiffs' breaches of covenant.

5. The 31st and 32d errors indicate parts of the charge permitting the jury to find a special verdict for $11,708 for the *extra cost* of moving the earth by train.

The evidence on this subject has already been noticed to some extent. The view which it is submitted ought to be taken of it, is that the evidence of Alexander and Phillips was in conflict; Alexander testifying inferentially to an agreement to pay the extra cost, and Phillips denying that he made such agreement, and also denying that there would be any extra cost, inasmuch as the defendant furnished the train. And, as we have seen from the evidence of Chief Engineer Wellman, all the work as done was embraced in the estimates; not any extra cost for doing it, for he was guided by the written contracts in allowing for the work according to measurement. So it is fair to say that there was a misconception of the testimony in the way of putting it, adopted by the court. But it seems to be enough to remark that there was reason for an expression of opinion on the part of the court, that it would hazard any general verdict in favor of the plaintiffs to have this item of $11,708 included in it. (See page 75 of printed Record.) Wherefore, a special finding was allowed to be brought in to cover it. It is, however, so clearly outside of the written contract between the parties that it never ought to have gone into the case. The defendant objected to it at every step—when the evidence of plaintiff Alexander was offered, when the court charged on the subject, and by the motion for a new trial, urging that this finding or special verdict was erroneous (see p. 51 of printed Record), and great injustice would be done the defendant by allowing this amount, which was not claimed in the declaration, and could not be estimated for consistently with the alleged special arrangement.

6. The 33d error relates to that part of the charge which permitted the jury to include in their verdict $2,167.20 for ties not included in the estimates. This part of the charge did not allow the written contract to govern as to the necessity of obtaining estimates, but allowed the jury to judge from any evidence before them whether this item was proved. The evidence, as before observed, went to show that this amount of ties merely replaced an equal amount which had been provided by the defendant as an accommodation to Hopper, Boyle & Co., and which they, or the plaintiffs succeeding them, ought

to have returned to the defendant—(p. 63 of printed Record). These ties, it will be noticed also, were for the line below section 40, as to which full payment was made October 15th, 1872—(pp. 63, 64 and 68 of printed Record).

7. The 34th error is assigned because the part of the charge there referred to allowed the jury to find against the defendant for the cost of the supply road from section 46 to section 76. That allowance could not of course be made upon any estimate by the Engineer. The supply road was cut to enable the plaintiffs to carry provisions or do teaming, so far as they should need to do so, beyond where the track was already laid. As fast as the iron was laid cars would run, and the supply road would become useless; and if, as we have seen, the plaintiffs had performed their part of the contract, the whole of this supply road would have become useless as early as the 15th of November. 1872, for they were to complete the road up to section 80 by that time. It is, therefore, purely a bonus to them for their own default to allow them to pay for this supply road. It is a bonus, also, in the further sense that in the estimates for work done and materials provided they have full legal compensation for the cost to them of this supply road.

8. The 35th error assigned relates to that part of the charge which permitted the jury to find against the defendant for the houses, shops, stables, &c., and lumber and shakes of the plaintiffs. The observations just made with reference to the supply road apply here, and with added force. This is a charge made against the defendant, not within the terms of its contract, and not because the plaintiffs performed their part of the contract, but in the face of the fact that the plaintiffs did not do as they agreed, and left this property on the line after they ought to have done all the work along that part of the line, and then never gave any notice or permission to the defendant to take such houses, &c. Then, again, what was there to prevent the plaintiffs from taking the materials which they had put into these houses, if they were really theirs, and how can it be said that the plaintiffs have not been paid for them out of profits under the estimates made for work done.?

9. The 36th error specifies a part of the charge which allowed against the defendant damages for supposed losses to the plaintiffs in respect to the teams, wagons, harness, pickaxes, shovels, wheelbarrows, &c., of the plaintiffs. This part of the charge is objected to in two particulars: that is, not only because it permitted the jury to take into consideration any supposed loss to the plaintiffs upon such property, but also because of the rule which the court laid down for estimating such loss.

It is not to be supposed that the defendant intended to guarantee the plaintiffs against loss upon property of this kind in any contingency. Such a construction cannot be put upon the contract as to indicate that any such matter was contemplated by the parties; nor again can it be argued that the defendant had any reason to think that the plaintiffs would have no other job of Railroad work than this single one upon which to use this property. The plaintiffs were at liberty to bring the property away, and the Railroad was there to enable them to bring it if they chose. But it seems that they preferred rather to charge against the defendant damages to the extent substantially of the difference between the property when it was new and the price they could obtain for it there upon the ground without removing it, or as the court put it the difference between what it was worth to them for the purpose of carrying on the work and what they could get for it after the work stopped. We have seen already that if the defendant had exercised the option of giving notice to the plaintiffs to terminate the contract, as could have been done, (see p. 22 of printed Record,) the plaintiffs, if they were owners of this property, would have been obliged to keep it themselves and make use of it, or at least could not have taxed the defendant with any loss on account of it. Then why should the defendant be now charged with this pretended loss? It may be answered that the plaintiffs did not want to do any other Railroad work. But that was immaterial to the defendant, and no principle upon which the defendant should be required to pay for this property can be extracted from the contracts or any general rule on the subject of damages. The motive of the defendant has not been impugned, and punitive damages, even if they were permissible in this form of action, should not here be allowed.

By the rule adopted by the court the defendant was required to make good to the plaintiffs any difference between what this property was worth to the plaintiffs to do this Railroad work, and its value to the plaintiffs after the work stopped, allowing the plaintiffs to sell it off where it was. That was as much as to say that if the plaintiffs had a yoke of oxen that would be worth $200 to them in doing work of this kind, but the oxen would only sell for $30 there or for any other kind of work, the plaintiffs should have $170 damages on account of that yoke of oxen. The damages were not justly recoverable, nor was the rule laid down with respect to them proper.

10. The 37th error assigned specifies a part of the charge which allowed pay to the plaintiffs for the care, protection and handling of their property, to wit: tools, teams, wagons, harness, pickaxes, shovels, wheelbarrows, etc., from the time the work stopped up to the time that the plaintiffs were able to get it out of the woods, or determine what should be done with it.

It is submitted that the stoppage of the work by the plaintiffs could not rightfully throw upon the defendant either the cost or responsibility of taking care of this property. The defendant might with perhaps equal propriety be required to pay the family expenses of the plaintiffs.

11. The 38th error assigned sets forth a part of the charge under which the defendant was charged with supplies consumed by the plaintiffs' men for a time after the work stopped, when it is assumed to have been uncertain whether the plaintiffs would go on or not. During this time, to wit: from November 28th, 1872, to December 19th, 1872, when the men were paid off by the defendant, these men appear to have been in mutiny, not performing any labor. The mutiny, however, was in consequence of the plaintiffs not having paid the men. This it was the duty of the plaintiffs to do, and it is here submitted that if the plaintiffs should be allowed pay for these supplies consumed by the mutinous men, this would be a reward to the plaintiffs

for breaking their own contract, in not paying the men. The immediate cause of the idleness and mutiny of the men, and the consumption by them of any supplies for which they did not pay, was the plaintiffs' failure to pay their wages; and if that came from the non-payment of estimates, *as the remote cause*, this could not legally charge the defendant.

12. The 39th error assigned objects to that part of the charge which permitted the jury to find against the plaintiffs for the telegraph poles put up by the plaintiffs. This part of the charge seems to have been designed to put a construction upon the following provision in the contract of July 18th, 1872, to wit: "That the second party shall place telegraph poles on the entire line of its work, as fast as the same is cleared, and the first party shall put up the wire and maintain line, furnish and pay an operator at or near the end of the iron, in a car to be moved from time to time as the iron is laid, and the line so operated shall be free to both parties during the construction of the road, and said operator shall be boarded by or at the cost of said second party." (P. 6 of printed Record.) The poles would, according to this provision, be needed or put up only so far as the iron was laid, to which point the operator's car would be advanced as the track-laying extended. It therefore follows that the estimates for work done would embrace all the work to be done by the plaintiffs up to the end of the iron, and that in the estimates returned, the plaintiffs would be allowed for everything that the contract would entitle them to, and would have all such benefit of and from these poles as the contract would in any contingency allow. The present allowance for these poles is therefore inconsistent with the contract, and is in the nature of a second payment. But, independently of any reasoning on the subject, an appeal to the contract will show that the defendant never agreed to pay for the poles directly, or as if it had been made its duty to furnish them, as the charge supposed. The contract said it was *the duty of the plaintiffs to furnish the poles;* but the charge shifted the duty, and thus misconstrued the contract.

13. The 40th error assigned has relation to the instruction that the jury could allow interest at seven per cent. upon the amount of the estimates. The contract does not fix any place of payment. The evidence, however, shows that when the estimates were to be paid, the plaintiffs came to Chicago to receive the money. (See p. 55 of printed Record; p. 70 of manuscript Record.) And the plaintiffs even refused to go to Stevens Point and receive money in December, 1872. (P. 59 of printed Record; p. 178 of manuscript Record.) If, therefore, the place of payment should govern as to the rate of interest, and it should be found that interest was legally due, the Illinois rate of six per cent. per annum would govern, and not the Wisconsin rate. There was nothing in the case authorizing the allowance of the Wisconsin rate of interest, and it was also unjust to allow such interest upon these estimates, because as early as December 14th, 1872, the defendant was ready to pay at least $40,000 on account of the estimates made prior to that time, and the reason why this sum was not paid over to the plaintiffs, was that they declined to take it and pay the laborers out of it, and the defendant had to send it up to Stevens Point in order to pay the laborers. The defendant then made payments to the plaintiffs' men to the amount of $26,869, (p. 65 of printed Record,) and to laborers of Whitman & Perkins, plaintiffs' subcontractors, $4,990.60, and on the pay rolls of Folsom & McConnell, subcontractors, $6,215.13. (P. 69 of printed Record.) Here then we have payments to the amount of $38,074.73, besides the sum of $3,453.75 which was paid by defendant in November. (See p. 56 of printed Record.) And yet the court in this part of the charge assumed that the estimates were wholly and fully due, and also assumed that the defendant had no right to make any set-off against or deduction therefrom. The better view certainly was that the defendant was not under obligation to pay these estimates in full, nor even any part thereof till the laborers were paid; and especially after paying the laborers the defendant had a right to credit on the estimates, and the sums just now stated should have been deducted, together with damages for the plaintiffs' defaults. These estimates were not therefore absolutely

due from the defendant, and it was an error to advise the jury to treat them as due and allow interest on them at the Wisconsin rate of seven per cent.

14. The 41st error assigned relates to that part of the charge which allowed the jury to find for the seventy barrels of cement. This matter has been presented in considering the rulings of the court in respect to the admission of testimony; also, in commenting upon the fact that so little consideration was given to the terms of the contract, as to the necessity of obtaining estimates, and in refusing a prayer for an instruction pointing to this particular item. The court here placed this seventy barrels of cement in the category of personal property which the plaintiffs had on the line at the time they suspended the work, and informed the jury that if they were satisfied that the cement was taken to the work for the purpose of performing the contract, they would find the difference between its value at the time the work stopped and its value to the plaintiffs for carrying on the work. How the jury could ascertain what would be its value for the purpose of carrying on the work, there would be great room for conjecture. The latitude allowed the jury in making an estimate would seem to be very considerable, and it does not appear that any responsibility was put upon the plaintiffs for taking care of the line, nor in respect to allowing the defendant to take it; but the defendant was to be charged with its value to the plaintiffs for use in the work, less its value to the plaintiffs at the time the work stopped. The testimony of plaintiff Alexander was that the use of the cement became unnecessary, because wood-work had been used instead of masonry; but the Engineer's testimony tended to show that no cement was ever necessary, and that there was not any claim to him for the cement. (P. 69 of printed Record.) It is submitted, therefore, that not only was there no excuse for making the charge for this cement as a matter subject to be estimated for, but that if it ought to have entered into the estimates, no reason appeared for making any allowance for it. Therefore, the part of the charge now in question was altogether erroneous.

The 42d error assigned refers to so much of the charge as tended to authorize an allowance for work performed, or materials therefor provided, where no estimate for the same by the Engineer had been made, or appeared to have been applied for, and where there was no evidence of fraud, nor of any refusal of the defendant to have work or material estimated. This has been touched upon, to some extent, in other points. The objection now made is outlined at page 79 of the printed Record. It there appears that the defendant, in making exception to parts of the charge tending to authorize allowances for work and material where no estimate for the same had been made by the Engineer, or appeared to have been applied for, urged that the estimates should be deemed conclusive where there was no evidence of fraud, nor of any refusal of defendant to have such work and materials estimated. This objection was well founded in law, as *Canal Trus.* vs. *Lynch*, 5 Gil., 521, and other authorities above cited in connection it, will prove.

15. The 43d error assigned relates to that part of the charge which excluded and withdrew from the consideration of the jury the whole claim of the defendant for damages growing out of the plaintiffs' breach of contract.

It appeared in evidence that first mortgage bonds were issued to the defendant at the rate of $25,000 per mile of completed road; and Mr. Phillips estimated that the use of the road for one hundred miles from Stevens Point from November 15th, 1872, to February 17th, 1873, would have been $20,000. The business for the road which he would have anticipated would have come principally from the transportation of lumber. (P. 68 of printed Record.) The court, however, assumed the province of determining as to the weight of this evidence, and ruled that the claim for damages was based upon too many contingencies, and that the getting of any interest on the first mortgage bonds was too conjectural or problematical to justify an allowance of damages to the defendant. But in thus passing upon the testimony the court took the place of the jury. The evidence ought to have been submitted to the jury for their consideration, and it was clearly erroneous to exclude and withdraw it from them.

Hickman vs. *Jones*, 9 Wal., 197.

A perusal of the contract of July 18th, 1872, or of either of the other contracts referred to in the declaration, will show that the parties anticipated that damages would accrue and become due to the defendant in case the plaintiffs did not perform the work within the contract periods; and the exclusion of the whole of defendant's claim for damages was in marked opposition to *Phila., Wilmington and Balto. R. R. Co.* vs. *Howard*, 13 Howard, 307.

16. The 45th error assigned has reference to the overruling of the motion in arrest of judgment. So much was said about the declaration under Point I, for the purpose of elucidating the exceptions with reference to the admission of testimony, the refusal of the defendant's prayers for instruction, and the giving of various parts of the charge, that reference may now be made to the matters there stated as tending to support the motion in arrest. It evidently appears from the declaration that the plaintiffs had departed from their contract, and relied upon a tacit, or perhaps a verbal acquiescence on the part of the defendant, as condoning such departure; but the declaration does not aver ability or readiness on the part of the plaintiffs to complete the work on their part within the contract time, and therefore as there was no legal prevention, the right of action on the contract itself does not appear, whatever may be said as to the power to maintain an action of assumpsit for work actually done.

ARGUMENT.

The bill of exceptions in this case makes reference to the contracts as being incorporated in the declaration, following, in this respect, *U. S.* vs. *Roberts et al.*, 9 Howard, 511.

The questions presented may be divided into a few general classes, and one of them is, whether the plaintiffs show a good cause of action. This brings into review the declaration, a prayer asked by the defendant and refused, and several parts of the charge. Then come several questions involving the rulings on the trial, and the construction of the contract in reference to charging the plaintiff in error with various matters, with such questions as these:

Was the Circuit Court justified in admitting evidence in respect to the several claims advanced by the plaintiffs? Was the court justified in excluding testimony offered by the defendant, now plaintiff in error; and in denying the defendant's prayers for instructions severally and respectively? Or, should the court have charged as it did in respect to the several claims of the plaintiffs? And was the court justified in excluding and withdrawing from the consideration of the jury the claim of the defendant, now plaintiff in error, for damages growing out of the plaintiffs' breaches of covenant?

Much detail has been obviated by the fullness of previous suggestions.

I.

The declaration does not show that the plaintiffs were able or ready to perform within the time limited the work which remained to be done under the contracts on the 15th of December, 1872; nor does it show that the defendant prevented such performance. The non-payment by the defendant of moneys then due the plaintiffs was not a prevention.

Palm et al. vs. *Ohio & Miss. R. R. Co.*, 18 Ill., 217.
County of Christian vs. *Overholt et al.*, 18 Ill., 223.
Kinney vs. *Sherman et al.*, 28 Ill., 523.
Fitzgerald vs. *Hayward*, 50 Mo., 524.

The allegation that the plaintiffs had underlet a part of the work is not equivalent to an allegation that they had the ability to perform that part of the work, or were ready to do it according to the contract, and the fact of there being subcontractors was altogether immaterial.

Story vs. *N. Y. & Harlem R. R. Co.* 6 N. Y. (2 Seld.), 85.

The defendant did not hinder the plaintiffs from performing the work; and so far as the action is for that part of the work, to wit, the first five sections of twenty miles each of the Middle Division of the Wisconsin Central Railroad, which by the contract of July 18th, 1872, ought to have been completed by the plaintiffs by the 15th of December, 1872, the declaration shows that the plaintiffs undertook more than they could perform, as they say they prosecuted the work with all the energy and skill they possessed (p. 30 of Record, averment in the declaration), and their failure in respect to full performance may therefore be said to have been voluntary, and to debar them from an action of covenant on the contract.

Rees vs. *Lines*, 8 Car. & Payne, 126.
Bank of Col. vs. *Hagner*, 1 Pet., 455–465.

The case up to that point is one of voluntary failure by the plaintiffs to perform their covenants, and covenant is not their appropriate form of action.

Faxon vs. *Mansfield*, 2 Mass., 147.

The complexion of the declaration comports only with an action for a *quantum meruit*.

Fitzgerald vs. *Hayward*, 50 Mo., 524.

And it is apparent from the declaration that the plaintiffs did not perform their part of the covenants up to the time of the alleged breach by the defendant, and that they allege in palliation a verbal or tacit acquiescence on the part of the defendant, which is not sufficient to sustain covenant.

Jewell vs. *Schroeppel*, 4 Cow., 564;
2 Greenl on Ev., § 235;
Sherwin vs. *Rutland & Burlington R. R. Co.*, 24 Vt. 347.

The declaration does not come up to the standard required by *Dermott* vs. *Jones*, 23 Howard, 220, and *Slater* vs. *Emerson*, 19 Howard, 224.

The first prayer for instruction on the part of the defendant, (see p. 70 of printed Record,) was intended to hold the plaintiffs to the doctrine of those cases, but the court refused it, and in charging the jury lowered the standard which the plaintiffs had avowed.

The plaintiffs undertook to show that the defendant had expressed its entire satisfaction with the manner in which the plaintiffs were doing the work, and with the rate of progress they were making towards completing it; but the evidence did not support the allegation, and the court held that it was sufficient if the defendant recognized the contract as in force after the plaintiffs' default. In this also the court excused the the plaintiffs from sustaining an issue the burden of which they had assumed, they having by the replication to the fifth plea, undertaken to show that they were in fact prosecuting the work with such vigor and means as would have enabled them to complete it within the time limited by the contracts. In the absence of such proof, the failure on the part of the plaintiffs may be said to have been voluntary, and they committed the first defaults; but the charge placed them on as favorable footing as if there had been no failure to do their work as to the different parts of the road within contract time.

II.

There are some matters in reference to which a construction of the contracts governing the case is invited. One is the matter of the $15,000, called in the charge of bonus; another has reference to the necessity of obtaining estimates as a condition precedent to any right on the part of the plaintiffs to demand money; a third pertains to the alleged extra cost of handling the earth by train at certain points, and a fourth pertains to the telegraph poles. Of these in their order.

1. The matter of the so-called bonus of $15,000, may be considered with reference (*a*,) to the consideration for which that sum was to be paid by the defendant, and also (*b*,) in regard to the time and conditions upon and under which it was to be paid.

(*a*.) The Circuit Court called this a bonus due on the completion of the first sixty miles, and said it "was to be held or retained by the defendant as security for the completion of the first sixty miles." (P. 74 of printed Record.) Again the court said, "this sum was held by the defendant in the nature of a claim for the completion of the work." * * * "By the terms of the contract of July 18th, it seems to me that the sum of $30,000 was to be paid and had been fixed upon by agreement of parties as liquidated damages or compensation for the extra work which had been performed and was to be performed on the first forty miles of work, and $15,000 of this $30,000 was to be paid in cash at the time of the execution of the July contract, and the remaining $15,000 is the $15,000 item I am now discussing; in other words, this $15,000 had been and was due to plaintiffs for work done on the first forty miles of road, and was retained by defendant as a guaranty for the faithful completion of the next twenty miles beyond." (Pp. 74 and 75 of printed Record.)

Was it, however, provided by the contract that this $15,000 should be a bonus to the contractors, plaintiffs below, for the completion of the first forty miles of the road? Was their work in completing that part of the road to be a consideration for the payment of this sum of $15,000? In examining the contracts we find that Hopper, Boyle & Co., two members of which firm are plaintiffs, had not on the 18th day of July 1872 fully performed their contracts dated September 7th, 1871, and January 25th, 1872. The latter of these two contracts allowed them an extension of time for the completion of the first twenty miles, and also for the completion of the second twenty miles of road; the work on all of which forty miles of the road they had undertaken to do by the contract of Sept. 7th, 1871. The time allowed them for the completion of the second twenty miles by the contract of January 25th,

1872, was not to expire until the 15th of September, 1872. Then, when the contract which was entered into by the plaintiffs with the defendant was made on the 18th of July, 1872, the defendant desired that the work on the whole of the forty miles first contracted to be done by Hopper, Boyle & Co. should be completed at an earlier date than said Hopper, Boyle & Co. had by their said second contract agreed to perform it, that is to say, that it should be done by the first day of September, 1872, which was to be fifteen days earlier than Hopper, Boyle & Co. had by the contract of January 25th, 1872, agreed to have it done. It seems probable, also, from the language of the contract of July 18th, 1872, that some differences had arisen between Hopper, Boyle & Co. and the defendant, in that Hopper, Boyle & Co. desired extra allowances for work done and to be done on said forty miles or elsewhere, and made objection to prior diminutions by the defendant of quantities. Under such circumstances as these, the contract of July 18th, 1872, was entered into; it bringing upon the work as contractors two parties, to wit: plaintiffs Alexander and Rutter, who had not been parties to the prior contracts, and H. S. Boyle, one of the parties to said prior contracts, retiring, leaving his co-partners, Seymour and Hopper, to join with the new parties, Alexander and Rutter, in making the contract of July 18th, 1872. This contract last named expresses the consideration upon which the sum of $30,000 was to be paid by the defendant to the plaintiffs, and states the consideration in this way: "it being understood that the said sum of $30,000, paid and to be paid as herein provided, is to be received and taken in full for extra allowances on work done and to be done on said section of forty miles, *and in full for all claims for past or future diminution of quantities*, and that the said second party (meaning the plaintiffs below,) for and in consideration of the assignment of said contracts (those of Hopper, Boyle & Co., aforesaid,) and of the sum of $15,000 in hand paid, and of the sum of $15,000 to be paid as herein provided, *and of the covenants and agreements by said first party* (the defendant below) *in said contracts and herein contained*, covenants and agrees, first, that it has taken said assignments of said contracts subject to the conditions, covenants and agreements

therein on the part of the second party, thereto to be kept and performed, *and will keep and perform said covenants and agreements in all respects except as the same have been modified and changed by the covenants and agreements herein contained*, &c." (P. 4 of printed Record.)

The consideration therefore for the agreement on the part of the defendant to pay the sum of $15,000 now in question was not merely that the plaintiffs should complete the first forty miles of the road, but this money was promised primarily as a consideration for the undertaking by the plaintiffs to do all the work that Hopper, Boyle & Co. had by their contracts of September 7th, 1871, and January 25th, 1872, covenanted to do, but had not on the 18th of July, 1872, fully done. It was, again, to be in consideration, among other things, that the plaintiffs undertook to complete the first forty miles of the road at an earlier date than that at which Hopper, Boyle & Co., had agreed to have that part of the work done. It was, also, not only to be in full for extra allowances on work done and to be done on said forty miles, but was likewise to be in full of all claims for previous or future diminution of quantities.

The Circuit Court did not therefore follow the contract in charging that the sum of $30,000, one-half of which was paid at the making of the contract of July 18th, 1872, and the other half of which is now in question, was fixed upon by agreement of the parties as liquidated damages or compensation for the extra work which had been performed and was to be performed on the first forty miles of the work, nor did the court rightly construe this contract in stating that the unpaid half of this $30,000 had been earned, and was due to the plaintiffs for work done on the first forty miles of the road. (Pp. 74 and 75 of printed Record.)

It was as necessary for the plaintiffs to complete the sixty miles of road to earn the $15,000 now in question, as it was for them to complete the first forty miles, since the consideration for the covenant to pay this $15,000 was the plaintiffs' agreement to complete that sixty

miles of road, together with their agreement to carry the work forward upon the one hundred miles beyond, in order that all should be done within the contract time, and further, to relieve the defendant from any claim for past or future diminution of quantities upon the whole line of one hundred and sixty miles.

(*b.*) The Circuit Court held that this $15,000 was earned by the plaintiffs when they completed the first forty miles of the road, and that thereafter it was retained by the defendant only as security for the completion of the next twenty miles, and that if the defendant on or about the 15th of December, 1872, this date, however, not being held to be material, gave plaintiffs to understand that defendant was unable to pay the estimates then due for the work under the contract, and that it was uncertain or doubtful whether it would be able to pay future estimates for work, the defendant should pay this sum of $15,000 to the plaintiffs, because the plaintiffs had earned it by completing the first forty miles of the road, and because upon such a supposition as to the defendant's pecuniary disability, the defendant had put the contract at an end. But the contract says that this sum of $15,000 was to be paid *on the completion of the first sixty miles as in the contract provided*, that is to say, provided the sixty miles should be completed on or before the 15th of September, 1872, which was three months before the alleged default on the part of the defendant. (See p. 4 of printed Record.) The conditions therefore upon which this $15,000 was to be paid had not been complied with by the plaintiffs; they did not complete the first sixty miles by the 15th of September, nor did they ever complete the same, although they alleged no default on the part of the defendant until the lapse of three months after the time at which they ought to have had the sixty miles completed. Nor should the circumstances supposed by the court with reference to the defendant, to wit: that the defendant gave the plaintiffs to understand that the defendant was unable to to pay estimates made prior to December 15th, 1872, and that it was uncertain or doubtful whether it would be able to pay future estimates for work, put the contract at an end, since this did not prevent the plaintiffs from going on and completing the first sixty miles

of the road. Certainly a misfortune to the defendant, a calamity of financial crisis making it difficult to negotiate securities, should not be allowed to justify harsher treatment of it than if it had voluntarily, or without reason, or for selfish purposes, refused to make payments. The authorities would make a distinction between a misfortune and a voluntary breach (*Heard* vs. *Bowers*, 23 Pickering, 455); and yet in neither case has the mere non-payment of estimates been held to be a *prevention of performance* under contracts similar to this now under consideration. It may be said that under the circumstances supposed in the charge of the court, the plaintiffs were at liberty to discontinue their work, or at least to suspend it while the condition of the defendant remained in that supposed state, if they so elected; but yet it cannot be said that the plaintiffs were entitled to the payment of this $15,000 before completing the first sixty miles of the road, because in express terms this sum of $15,000 was payable only on the completion of the first sixty miles of the road; that is, the defendant agreed to pay "the sum of $15,000 when the first sixty miles of said road shall be fully completed," &c. (P. 4 of printed Record.) Then an election by the plaintiffs to treat the contract as at an end before completing the first sixty miles of the road is supposed by the court to have been made; but it can be answered, and the contract does answer, that such election being before the work on the sixty miles was completed, it was before this sum of $15,000 was payable by the defendant, and therefore that this sum cannot be recovered by the plaintiffs.

Nor were the plaintiffs entitled to an apportionment of the money, since it was a sum in gross, intended to be payable, for that matter, because the plaintiffs covenanted to execute the work under these contracts of September 7th, 1871, January 25th, 1872, and July 18th, 1872, and further covenanted to relieve the defendant from all claims for preceding or future diminution of quantities; and how can it be told how much of this $15,000 was actually earned by the plaintiffs? Then again the declaration shows that the plaintiffs could not do the work on the first sixty miles at the contract prices *except at a loss*; and as they chose to stop short and leave the sixty miles incomplete, throwing the

road upon the defendant to complete it at an extra cost as to this part of it, it would be unjust to give them the $15,000 which was to be payable to them only when they should complete the sixty miles.

The contract as to the payment of this $15,000 is entire and not apportionable (2 Parsons on Cont., 3d Ed., 35). But if the amount were apportionable, the plaintiffs would not, upon the showing made by the declaration, be entitled to the whole of it; for there should be deducted the loss to the defendant, arising from the non-completion by the plaintiffs of the sixty miles of road; there would be a loss, as the declaration shows, because the work could not be done at the contract prices; and there was also a further loss, because the plaintiffs did not do it within the contract time. And the case of *Phila., Wilmington & Balto. R. R. Co.* vs. *Howard*, 13 Howard, 307, would clearly require that compensation for such losses to the defendant should be deducted from the $15,000, if it were apportionable, and any part of it could be recovered.

The ninth prayer on the part of the defendant, refused by the court, was as favorable a statement of the matter as the plaintiffs could ask.

2. As to the retained percentage of $19,937.55, the court erred in requiring the defendant to pay it all over without any deduction or recoupment, and without reference to the right of the defendant to pay it in part in Portage County, Wis., bonds, at 90 per cent. of their par value. (P. 22 of printed Record.) This per centage was on account of work done beyond the first forty miles, and was to be be left in the hands of the defendant, and held as additional security for the performance of the plaintiffs' contract, and to be forfeited to the defendant, and applied towards the payment of any claim for damages for failure by the plaintiffs to have the work of construction completed in the time specified. (P. 5 of printed Record.) Therefore, inasmuch as the plaintiffs never completed the third section of twenty miles, but, without any excuse, made default in completing the same, they had no right under the contract to ask full payment of this retained per centage without deduction or abatement.

3. The Circuit Court allowed the claim for the telegraph poles on the ground that the contract entitled the plaintiffs to pay for these poles. (P. 78 of printed Record.) But the contract cannot be so construed. The provision therein on the subject was, as we have seen, that the telegraph poles should be placed *by the plaintiffs* on the entire line of the work as fast as the work was cleared; that the defendant should put up the wire, and maintain the line, and furnish and pay an operator at or near the end of the iron, in a car to be moved from time to time as the iron should be laid; that the line so operated should be free to both parties during the construction of the road, and that the operator should be boarded by or at the cost of the plaintiffs. (P. 6 of printed Record.) There is no promise or covenant whatever on the part of the defendant to pay directly for the poles. On the contrary, the poles were to be furnished by the plaintiffs, and therefore were to be paid for by them, and they were to get their pay through estimates for the work in general. As fast as any clearing or other work was done by them, they were entitled to estimates; and of course, therefore, they must necessarily, through those estimates, and through the use, together with the defendant, of the telegraph, receive all the compensation which was intended for them: such compensation, although of an indirect character, being all that was provided for by the contract; and for aught that it appears, the poles for which the court so allowed them were placed only to the end of the iron, upon a part of the road as to which the estimates in favor of the plaintiffs were as full as if no difference between the parties had arisen at any time, and as if the work had gone through uninterruptedly to the end.

4. Another point of misconstruction of the contracts was in regard to the necessity of obtaining estimates or certificates from the Engineer.

The plaintiffs took assignments from Hopper, Boyle & Co. of the interest of said Hopper, Boyle & Co. in the contracts of September 7th, 1871, and January 25th, 1872, and thereupon entered into the contract of July 18th, 1872; and by the latter contract it was

provided that said plaintiffs took said two former contracts subject to the conditions, covenants and agreements therein on the part of said Hopper, Boyle & Co., and were to keep and perform said covenants and agreements in all respects, except as modified by this agreement of July 18th, 1872. And further also, and in express terms, reference was by said contract of July 18, 1872, made to said two former contracts, as being annexed to and made a part thereof. (Pp. 3 and 4 of printed Record.) Looking, then, to the contracts of September 7th, 1871, and January 25th, 1872, to see under what circumstances the defendant was to make payment of any moneys, we find (see pp. 9 and 10, 21 and 22 of printed Record) that payment was only to be made upon estimates certified by the Chief Engineer of the Wisconsin Central Railroad Company. These estimates were not to be paid in full when the pay-day, which was to be on or about the 15th day of every month, for all work done the previous month, should arrive, but fifteen *per centum* of each and every estimate was to be reserved. The estimates were therefore to be the measure as to the amount of work done, the amount to be allowed for it, and the retained percentage; and such estimates coming from the Chief Engineer of the Wisconsin Central Railroad Company would operate as between that Company and the defendant in determining the rights of the defendant as a contractor for building the road, the plaintiffs being subcontractors under the defendant. Very large powers were also given to said Engineer as an umpire between the parties.

There cannot be any doubt that it was necessary for the plaintiffs to obtain estimates, nor that the obtaining thereof was a condition precedent on their part, nor that in the proof they should have been limited to such estimates, according to *U. S.* vs. *Robeson*, 9 Peters, 319; no reason being presented by them for not getting estimates in any case or matter in respect to which they were entitled to pay for work or materials. The Circuit Court erred in placing even the evidence of the Engineer on as high a footing as his certificate and estimate for which the contract provided. The court said to the jury that they would ascertain the sums due for work performed under the contract

mainly from the estimates *and the evidence of the Chief Engineer* as the most reliable basis upon which they could make their computation, thus treating the oral statement or evidence of the Engineer as being as high authority as his certificates or estimate regularly made according to the contract. (See p. 74 of printed Record, and errors 27 and 28.) But the court even went further in the suggestion that the estimates and the evidence of the Chief Engineer were but barely data in making the computation, and also in letting in the evidence of plaintiff Alexander as to ties which he claimed should have been included in the estimates for October or November, (pp. 56 and 57 of printed Record,) although Chief Engineer Wellman testified that it had been his design to estimate all the work of all kinds. (P. 69 of printed Record.) And the court also let in the evidence of the plaintiff Alexander as to seventy barrels of cement which had not been included in the estimates, and the evidence of the witness Quinn as to labor on a side-track at section forty, and as to labor, ties and materials to the amount of $5,214,37. The various items so coming in, in addition to the estimates, amounted to from $3,114,37 to $5,214,37. All this evidence was incompetent and even less satisfactory in its character than that which in *Morgan* vs. *Birnie*, 9 Bing., 358, was held to be irregular.

5. The item of $11,708 allowed as the assumed *extra* cost for moving earth by train on sections from 42 to 46 was classed by the court with the $15,000, the retained percentage, and a claim for ties said not to have been included in the regular estimates. The apparent reason for this classification was that this was an item for work, but was disputed. (See pp. 74 and 75 of Record.)

If it should be said, however, that some of those items were provided for by the contracts, and that the court had but to put a construction on the writings, and apply it to the evidence, the classification could not comprehend the claim under consideration; for plaintiff Alexander did not profess to be entitled to this amount under the written contracts, and as the court said, (see p. 75 of printed Record,) it was "a claim for extra allowance not included in any estimates to the plaintiffs, nor included specifically in any provision of the contract, and

not specifically enumerated or provided for." It was claimed by the plaintiffs as being "over and above and in addition to the estimates," (p. 62 of printed Record,) and was based upon an asserted verbal understanding, (*ibid*), and the amount of it was ascertained by *an account supposed to have been kept by the plaintiffs*, (*ibid*). All these marks distinguish it from such items as could be allowed under the written contracts; and plaintiff Alexander admitted that the Chief Engineer, Wellman, declined to allow it, saying that it was a matter between Alexander and Phillips, and must be settled by them. (P. 63 of printed Record.) It was still further proved to be outside of the contracts, because said Engineer testified that he included in the estimates, which had been introduced in evidence, the excavation made by train, as well as the excavation made otherwise; it having been his design to estimate all the work of all kinds. (P. 69 of printed Record.) And he also testified that he had no data from which to make an estimate of the actual expense of doing the work by train, (*ibid*). The written contracts were satisfied by the making of estimates. Those estimates were provided for, and were necessary to be made, and when made they filled the limit to which the defendant was bound to go by the written contracts. The arrangement, therefore, upon which this item is based is altogether different from and outside of the writings; and the evidence of plaintiff Alexander in respect to it was not competent nor admissible, and error No. 16, questioning the propriety of admitting such testimony (see p. 62 of printed Record,) should be sustained, as should also errors Nos. 31, 32 and 44, relating to the charge concerning the matter and the including of this item in the judgment in opposition to the motion for a new trial.

Still other objections to this item are also apparant as (*a*) that the action was on written contracts which excluded any item of this sort not founded on a written order of the Engineer. The provision on the subject is: "Nor shall any claim be allowed for extra work, unless the same shall be done in pursuance of a written order from the Engineer, [or he] at his discretion, should direct the claim, or such part of it as he may deem just and equitable, to be allowed." (Pp. 17 & 29 of printed Record.) And under that provision the claim was baseless, as a mat-

ter arising under the contract in suit; not only because it was not based on a written order of the Engineer, but also because the Engineer, who was by the contract the common umpire of the parties, declined to allow it.

(*b.*) Nor did the declaration comprehend this item. The declaration recites as follows: "while the said defendant was indebted to the plaintiffs in a large sum, to wit: $250,000, for payment due to the plaintiffs for work done under the provisions of the aforesaid contracts," (meaning the contracts of Sept. 7th, 1871, Jan. 25th, 1872 and July 18th, 1872,) it "has utterly failed and refused to pay the aforesaid sum due the plaintiffs for work done as aforesaid." "And the plaintiffs further aver that in addition to the amounts due them as aforesaid *for work done under the said contracts in pursuance of the stipulations therein contained*, including the bonuses and retained percentage therein agreed to be paid, the plaintiffs suffered special damages by reason of the premises," &c. (P. 31 of printed Record.)

Full quotations have thus been made from the declaration to show that this item of $11,708 for the extra cost of moving earth by train is not embraced in any of the allegations, since it is not for "work done under the provisions of said written contracts," &c.

6. While on matters of construction, especially of the declaration, the point that the estimates for work in December, 1872, were not provable under the declaration is pertinent. These estimates were not by the terms of the contract payable until on or about the 15th day of the month next after that for which they were rendered. Thus the estimates now brought up for review being rendered for December, (see reference to estimates Nos. 1473, 1474 & 1475, p. 53 of printed Record,) they were not payable until on or about the 15th of January, 1873, and the declaration says that the plaintiffs prosecuted the work until on or about December 15th, 1872, and *at that date* while the defendant was indebted, &c., with other matter as before rehearsed, the defendant notified the plaintiffs, &c. So far, therefore, as the declaration is for moneys due for work, it is for moneys so due at *the date specified*, to wit: on or about Dec. 15th, 1872, and it does not fairly embrace moneys not due until on or about Jan. 15th, 1873.

III.

The estimates introduced in evidence relate to work above section 40, upon that part of the line which was covered by the contract of January 25, 1872. They are principally for work done on sections 41 to 60, but to a small extent for work done on sections 61 to 80, and to a smaller extent for work done on sections 81 to 100, all in October, November and December, 1872.

These estimates are for the following amounts in all, to wit:

Those for October work amount to	-	-	$42,832 49
" Nov. " "	-	-	23,609 23
" Dec. " "	-	-	10,042 05
Total	-	-	$76,483 77

From which should be deducted payments made by the defendant as follows:

Amount paid by defendant for plaintiffs in November, as admitted by plaintiff Alexander (see p. 56 of Record), - -	$3,453 75	
Amount paid Whitman & Perkins' men, for which plaintiffs took credit in settling with Whitman & Perkins, subcontractors under plaintiffs (see p. 62 of printed Record), -	4,990 60	
Amount paid Dec. 19 and 20, 1872, on plaintiffs' pay roll, to their laborers, and entered upon plaintiffs' books by Quinn, their bookkeeper (see p. 65 of printed Record), -	26,869 00	
Amount paid on pay rolls of Folsom & Mc Connell, plaintiffs' subcontractors (see p. 69 of printed Record), - - - - -	6,215 13	
		$41,528 48
Balance on the estimates, - - -		$34,955 29

The enormous difference between this balance and the amount of the judgment may be accounted for to some extent by the mention of other items which have already been referred to in this Argument, as having entered into the findings by the jury, to wit:

The so-called bonus of - - - - - - - -	$15,000 00
Retained per centage of - - - - - - - -	19,937 16
70 bbls. Cement (disputed), - - - - - -	262 50
Telegraph Poles (disputed claim), - - - - -	140 00
Ties not in the estimates (disputed), - - - -	2,167 25
Alleged extra cost of moving earth by train (disputed), -	11,708 00
	$49,214 91
Previous balance brought down, - - - -	34,955 29
	$84,170 20
But the judgment being for the additional sum of -	34,891 26
or a total of - - - - - - - - -	$119,061 46,

the composition of said $34,891.26 remains to be considered.

It was probably made up by allowing various items to which the defendant objected when the plaintiffs proposed to prove them; such as the following:

The cost of transporting men to the work from July 18, 1872, to the close of the work, taking plaintiff Alexander's largest figure for it (see p. 56 of printed Record), -	$5,000 00
Said plaintiff Alexander's estimate of tents on the line from section 40 to section 60 (*ibid*), - - - - -	3,000 00
10 log houses, $200 each (ditto), - - - - - -	2,000 00
Cost of supply road from section 46 to section 76, -	5,300 00
Plaintiff Alexander's estimate of depreciation in value of horses, etc, - - - - - - - - - -	3,252 00
Goods brought by defendant in its cars from section 46 to Stevens Point, March 6, 1873, some weeks after the suit was brought (estimated by Voak, p. 60 of Record), -	3,520 93
Scattered tools of plaintiffs' (ditto), - - - - -	2,016 50
Voak's salary and board, - - - - - - - -	288 86
Items in bill introduced by Quinn (see p. 63 of Record), after deducting $2,167.25 for ties previousiy mentioned,	1,200 44
Interest, say some - - - - - - - - -	2,500 00
Total, - - - - - - - - -	$28,078 73

This would still leave $6,812.53 to be accounted for as having been allowed on some such hyphothesis as that the defendant was an artificial being having no soul, &c.; for it is hardly probable that the jury would allow that amount for the consumption by the plaintiffs' mutinous men of supplies while they were idle, since plaintiff Alexander admitted that these supplies were mainly consumed by December 1st or 2nd, 1872, (p. 58 of printed Record,) which was two to four days after the work stopped.

The position assumed in the declaration was that the pecuniary condition of the defendant became such that any further work by the plaintiffs after December 15th, 1872, became impossible; which would mean that the plaintiffs were either unable or unwilling to advance any money to carry on the work: and this explains why the plaintiffs did not pay their laborers, but let them go into mutiny, &c. The conclusion deduced in the declaration was that the defendant's financial difficulties absolved the plaintiffs from all further attempts to perform the contracts, and that therefore the defendant should pay certain special damages, five items of which remain to be noticed: 1. The cost of hiring and transporting men to the work "*immediately prior*" *to the* "*unlawful abrogation by the defendant*" of the contracts. 2. The cost of erecting houses along the line to accommodate plaintiffs' workmen during the ensuing winter. 3. The cost of a supply road, constructed to get supplies and necessaries to the line of the railway. 4. The cost of collecting together, housing and guarding plaintiffs' tools and equipments during said winter. 5. The depreciation in value of the plant or stock of plaintiffs, including teams, implements and equipments suitable for Railroad work.

The court admitted and retained evidence in respect to each and all of these items, and did not confine it within the limits designated by the declaration; but, for example, permitted the plaintiffs to show the whole cost to them of transporting men to the work from July 18th, 1872, when they entered into the contract, until the work stopped, (pp. 56 and 72 of printed Record,) and allowed testimony to be introduced as to the bringing away in the cars of the defendant of personal

property from section 46 to Stevens Point after the commencement of the suit, ruling that such removal of personal property would be ground for claim in this case (p. 60 of printed Record); that it was immaterial that it was after the commencement of the suit, (*ibid*,) and also that it was immaterial that one of the plaintiffs, to wit: Mr. Hopper, had no interest in such property for which he with the other plaintiffs asked a recovery, (p. 72–3 of printed Record,) and as to such removal of property the court refused an instruction asked by the defendant, intended to avoid a charge for that which the defendant could not well avoid bringing away with its cars under the circumstances detailed in the evidence. (See defendant's 11th prayer, p. 72 of Record.)

The evidence thus admitted as to the cost of transporting men to the work did not conform to the declaration: that is, the declaration did not ask for an allowance of the whole cost to the plaintiffs of hiring and transporting men to the work *from first to last*. Nor did the declaration ask pay absolutely and in full for the personal property which the plaintiffs left in the defendant's cars at section 46, and had there when the suit was commenced. Hence, as to these items, it is objected that their allowance was not authorized by the declaration. As to the latter one, also, it is submitted that the whole claim was *inconsistent with the character of the action*, and for matter posterior to the bringing of the suit, and that the rulings in regard to it gave four plaintiffs a right to recover jointly as for a *quasi trespass* in respect to personal property wherein confessedly but three of them had at the time any interest.

But to these and all the other of the items under consideration some general rules of law and of construction can well be opposed.

Their unfitness is shown from such considerations as these:

1. In large measure they arose and were charged *because of the plaintiffs' own defaults*. Thus, the supply road only extended to section 76, and the plaintiffs ought to have had their whole work to that

point, and even up to section 100, completed at the very time of the alleged breach of the defendant; in which case, of course, the plaintiffs would not have had any sort of claim upon the defendant for the supply road, it having been cut merely for the plaintiffs' own convenience, and the learned District Judge having in his charge conceded that the supply road became useless when the Railroad was built. And so with the tents, houses and lumber for houses to shelter the plaintiffs' workmen; these were all between sections 40 and 60, where the work ought to have been done by the plaintiffs by September 15th, 1872, three months before the alleged breach of the defendant; and of course, therefore, there being nothing in the contract to require the defendant to pay for any such thing, and these tents and houses having been put there without any direction from the defendant, and remaining the property of the plaintiffs, no recovery for the same by the plaintiffs should in view of their own defaults, be sanctioned.

2. The allowance for such things as the supply road and the erection of such houses was also in the nature of a second payment to the plaintiffs therefor; the first payment, anticipated by the contracts, being in the profits for work done and included in the estimates.

3. The refusal of the defendant's fifth prayer for an instruction (see p. 71 of Record,) left it for the plaintiffs to recover for such items, although they neither gave notice nor permission to the defendant to take such supply road or other things.

4. The defendant, as we have seen, paid a large consideration to the plaintiffs for the right to diminish quantities at the pleasure of the defendant, and had the right to terminate the contract upon giving thirty days' notice of an intention to do so, and in that case was to be chargeable only with the hay, grain and provisions of the plaintiffs, at cost, at the time of giving such notice (p. 22 of printed Record), and this would, of course, exclude the various other items now under consideration.

5. These items are not legitimate claims for damage in the nature of the case, nor in view of the contracts; and are not such as naturally flow from the defendant's alleged breach.

The plaintiffs had allowed the work to drag and run into the winter, when but little if anything other than clearing and corduroying was expected to be done, (p. 5 of printed Record, clause 2 of mutual covenants,) and when, of course, the defendant could not be expected to have any use for these houses and tents between sections 40 & 60, nor for much other of the property with which it is now charged. But the assumption is that the plaintiffs were without any other job, say for the next season, or wished to retire from being Railroad contractors, and therefore they could sell off their plant, and charge the defendant with what *it would have been worth to the plaintiffs to do all this Railroad work*, less what they upon an almost immediate sale on the spot, without notice to the defendant, realized for it. The rule of damages laid down by the court was thus severe. Truly the defendant must be supposed to have been almost without the pale of legal protection when there were heaped upon it such charges as that for the consumption of supplies by plaintiffs' mutinous men and other matters attributable almost equally to the defaults of the plaintiffs.

6. By one of the conditions in the contracts, (see pp. 17 & 29 of printed Record,) the plaintiffs were not to charge the defendant for hindrances or delay from any cause in the prosecution of the work, though they might take the same as grounds for an extension of the time for completing the work. Therefore, when the plaintiffs elected to discontinue the work, if on the grounds supposed in the charge, that was a voluntary abandonment of the contract on their part which in all cases disables a party from maintaining an action on the covenant broken.

Faxon vs. *Mansfield*, 2 Mass., 147.

7. Interest should not have been awarded; especially not on the whole amount of the estimates, as they were not due in such sense that they were absolutely payable to and demandable by the plaintiffs. This was so as long as they failed to pay their laborers. The contract thus provided; intending to protect the road from liens under the State law in favor of workmen, and therefore allowing the defendant to retain

their dues, and make payment to such workmen. So when the defendant paid the workmen, the amount paid was to be deducted from the estimates, (pp. 7 & 19 of printed Record,) and hence only the balance of the estimates over and above such payment could be said to be due.

Nor was the Wisconsin rate of interest due. The place of payment, according to the custom of the parties, as the record shows, was in Chicago, (p. 55 of printed Record,) and if interest had been payable, the law of Illinois would govern as to the rate.

Considering the allowances which they obtained, the soliloquy of the defendants in error, when they descry the bright mirror of justice, reflecting upon them in the distant view, must be "Vaulting ambition o'erleaps itself."

The justice we should give wouldn't be a stranger to mercy.

IV.

The most that could with any propriety be charged against the defendant was for work actually done by the plaintiffs, reduced, however, by the damages which accrued to the defendant by reason of the failure of the plaintiffs to complete the third, fourth and fifth sections of twenty miles each of the road. The 4th, 5th, 6th, 9th, 10th and 13th prayers of the defendant (see pp. 70 & 72 of printed Record,) were therefore wrongly refused.

Fitzgerald vs. *Hayward*, 50 Mo., 524.
Palm vs. *O. & Miss. R. R. Co.*, 18 Ill., 217.
Co. of Christian vs. *Overholt*, 18 Ills., 223.
Kinney vs. *Sherman*, 28 Ills., 523.

It is not a case in which the defendant perversely interfered with the rights of the plaintiffs, nor did any act of prevention, nor for fradulent purposes withdrew the power from the plaintiffs to go on, as in

Philad., Wil. & Bal. R. R. Co. vs. *Howard*, 13 How. 307,
and *Doolittle* vs. *McCollough*, 12 Ohio St. R. 360,

and therefore the recovery of the plaintiffs should at the utmost have been limited to the actual amount of work done, especially as we might well argue that it was mainly, if not entirely, because of the plaintiffs' own preceding defaults that a financial stress came upon the defendant.

But from the contract price for work actually done and embraced in the estimates should have been deducted the defendant's damages, which were well proved; and the evidence in respect to the same should not have been withheld from the jury.

U. S. vs. *Roberts*, 9 Howard, 511.

In any point of view, therefore, the judgment should be reversed.

Respectfully submitted,

THOMAS DENT,
Attorney for Plaintiff in Error.

Supreme Court United States.

OCTOBER TERM, 1875.

The Phillips & Colby Construction Company,
PLAINTIFFS IN ERROR,
vs.
Mark T. Seymour, Elijah S. Alexander,
J. O. Rutter, and Andrew J. Hopper.
No. 44.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR,

BY EDWIN H. ABBOT,
Of Counsel.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1875.

THE PHILLIPS AND COLBY CONSTRUCTION COMPANY, Plaintiffs in Error,

vs.

MARK T. SEYMOUR, ELIJAH S. ALEXANDER, J. O. RUTTER, AND ANDREW J. HOPPER.

No. 44.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

[The Record is cited by referring to the marginal folio numbers. The Statement is intended to cover everything material, but only what is material, to the discussion of the special errors assigned in this brief.]

STATEMENT OF THE CASE.

The Phillips and Colby Construction Company (before the contracts now in suit were made) had contracted with the Wisconsin Central Railroad Company to build its road, which was located from Portage City, northerly, and from Doty's Island, (or Menasha,) westerly, to Stevens' Point, on the Wisconsin river, in the middle of Wisconsin; and thence northwesterly, through its central pine forests and the Penoka Iron Range, two hundred miles, to Lake Superior. The country above Stevens' Point was a wilderness of forest; without settlements, and without business until the

railroad reached it; but, as the road was finished, logs were cut, saw-mills were built, and lumber manufactured. The road was expected to create its own business. (Record, 136, 204, 205, 238.)

Along this route, the lands had been chiefly granted for building this road, (Record, 205.)

Act of May 5, 1864, § 3, 13 U. S. Statt, 67.

but would, by the terms of the grant, revert to the United States, if the railroad was not completed by May 5, 1874.

Act of May 5, 1854, § 9, 13 U. S. Statt, 68.
Act of June 21, 1866, 14 " " 360.
Act of April 9, 1874, 18 " " Part 3, 28.
Act of March 3, 1875, 18 " " " 511.

And (chiefly in consequence of the acts of the defendants in error) the Company was subsequently forced to ask, and finally obtained from Congress, an extension of this limitation until December 1, 1876.

Act of April 9, 1874, 18 U. S. Statt, Part 3, 28.

Upon completion by the company of twenty consecutive miles of railroad, with appurtenances, patents were to be issued for the granted lands which were coterminous with that twenty-mile section of completed railroad; but *no patents could be issued, unless the Governor of Wisconein certified that such twenty miles had been completed* in the manner required by the provisions of the grant.

Act of May 5, 1864, § 7, 13 U. S. Statt, 67.

The railroad rights did not attach to the lands granted until September 7, 1869;

Report of General Land Office for 1874, p. 307.

and the Commissioner of the General Land office estimated the quantity of lands, which the Railroad Company would receive from the grant, to be 750,000 acres.

Ib., p. 292.

The Construction Company was entitled to receive from the Railroad Company $25,000 of its first-mortgage bonds (which covered the entire line of road and all the land grants) for each and every completed mile of railroad, *upon completion of that mile; but the bonds were issued only upon completed road.* (Record, 130, 136, 137, 202–203.)

Of this fact, the defendants in error had full notice before they executed their contract of July 18, 1872, with the Construction Company, on which they now sue. (Record, 137, 130.)

The Construction Company was itself building the north end of the line near Lake Superior, where it had a large force of men. (Record, 199, 209.)

THE CONTRACTS.

On September 7, 1871, the Construction Company, being thus situated, contracted with Hopper, Boyle & Seymour to build the forty miles of the railroad which were located next westerly from Stevens' Point. (Record, 17, *et seq.*)

On January 25, 1872, the Construction Company made a second contract with Hopper, Boyle & Seymour to build the 120 miles which extended from the terminus of the first forty miles, northward, to the Penoka Iron Range. (Record, 52, *et seq.*)

In both these contracts the contractors agree:

(*a*) "To execute, construct, and finish, in every respect in the most substantial and workmanlike manner, and to the satisfaction and acceptance of the chief or assistant engineers of the Wisconsin Central Railroad Company or the said party of the first part, all the work," &c. (Record, 17, 52.)

(*b*) To begin work within a specified time, and "to prosecute the same with such force and means as will, in the opinion of said chief or assistant engineers, *insure the com-*

pletion," by certain specified days, of certain specified sections of road. (Record, 17, 53.)

(*c*) To be subject at all times to the directions of the engineers, and conform to those directions, and "progress with the same at such time or times, in such manner, and at such particular points on the line of said work," as the engineers direct; and that the chief engineer shall be an umpire to decide all matters of dispute under the contract, in relation to its stipulations or their performance by either party. (Record, 19, 54.)

In both contracts it is mutually agreed between the parties:

(*d*) That if the contractors fail or refuse to comply with any stipulation to be performed by them, the company may "cancel this contract and declare the same void," &c. (Record, 20, 54.)

(*e*) That if the contractors "neglect or refuse to progress with the work as fast as in the opinion of the engineer or party of the first part (communicated in writing to said second party) may be necessary *for the completion by the time specified herein,*" . . . . then the company may declare the contract abandoned, &c., or, at their option, employ other parties to execute any part of the work at the contractors' expense, &c. (Record, 21, 55.)

(*f*) That whenever, in the company's opinion, it is necessary "to secure to the laborers employed by the second party their wages, or to parties furnishing supplies or material for the work, their pay," then the company may pay such laborers and parties, and deduct all such payments from the amounts which may be payable to the contractors. (Record, 21, 56.)

(*g*) "That the decision of said chief engineer on any point or matter touching this agreement shall be final and

conclusive between the parties hereto," &c. (Record, 25, 60.)

In both contracts the Construction Company's agreement to pay was made in the following carefully guarded language:

(*h*) "And the said first party, *in consideration of the fulfillment and performance* of all the stipulations contained in this contract, *by said second party*, to be by said second party fulfilled and performed,

"*And whenever said work shall have been*, in the opinion of the chief engineer, completely *finished in every respect and performed* agreeably to the various stipulations and specifications of this agreement,

"*And said chief engineer shall have furnished* to said party of the first part *a certificate* of the fact under his his hand, *together with his estimate* of the quantity of the various kind of work done by said second party under this agreement, *which estimate shall be final and conclusive between the parties hereto*,

"Will pay to said second party, *within thirty days* [*fifteen days*, in September contract] *after said certificate and estimate shall* have been furnished by said chief engineer, *the sum which may be due under this contract agreeably to said estimate*, at the following rates and prices," * * * "to be paid in the following manner: Eighty-five per cent. to be paid in cash, *on or about the 15th day* of every month, for all work done the previous month," etc. (Record, 26, 28, 61, 62.)

(*i*) "And it is agreed between said parties that the first party shall have the right to retain fifteen per centum of each and every estimate made by said chief engineer on the said work *till the whole has been entirely finished and completed* to the satisfaction and acceptance of said chief engineer, *and he shall have furnished a certificate* to that effect to said first party. (Record, 28, 62.)

And, in order that the contractors might have no valid excuse for failure to complete the several sections of railroad at the several times specified in the contract, the mode and conditions of procuring an extension of those times, *if any real cause for such extension arose*, is defined:

(*j*) "No charge shall be made by the contractor for hindrances or delay from any cause in the progress of any portion of the work in this contract; *but it may entitle him or them to an extension of the time allowed for completing the work sufficient to compensate for the detention, to be determined by the chief engineer, provided he or they shall give the engineer in charge immediate notice in writing of the cause of the detention.*" (Record, 50, 85.)

And both contracts terminate as follows:

"Nor shall any claim be allowed for extra work, unless the same shall be done in pursuance of a written order from [or ?] the engineer, at his discretion, should direct the claim or such part of it as he may deem just and equitable, to be allowed.

"Contractors shall commence their work at such points as the engineer in charge may direct, and shall conform to his directions as to the order of time in which different parts of the work shall be done, as [and ?] the force required TO COMPLETE THE WORK AT THE TIME SPECIFIED IN THE CONTRACT." (Record, 50, 86.)

These contracts contain many other stipulations, which are not material to the discussion of the errors assigned in this brief and are not now quoted.

Hopper, Boyle & Company failed to perform their agreements.

On July 18, 1872, the defendants in error, by contract under seal with the Construction Company, assumed the September and January contracts above described, "which are hereto annexed and made a part hereof," and became

the contractors in place of Hopper, Boyle & Company, (Record, 8, *et seq*,) "subject to the conditions, covenants, and agreements therein on the part of the second party thereto, [Hopper Boyle & Company,] to be kept and performed."

The only change, made by this July contract upon the September and January contracts, which is material to the consideration of the errors assigned for discussion in this brief, is the substitution of other dates for the days originally specified in the September and January contracts for the completion of the several sections of the railroad and of the entire 160 miles, viz:

The defendants in error, co-partners under the name of M. T. Seymour & Company, covenant and agree to "*have the work on the said one hundred and sixty miles of road, as in said contracts and this agreement provided, completed at or within the times following*, to wit: The first section of forty miles on or before the first day of September next; the third section of twenty miles on or before the fifteenth day of September next; the fourth section of twenty miles on or before the fifteenth day of November next; the fifth section of twenty miles on or before the fifteenth day of December next; the sixth section of twenty miles on or before the first day of June next; the seventh section of twenty miles on or before the fifteenth day of July next; and the eighth section of twenty miles on or before the first day of October, 1873." (Record, 12.)

As an inducement to this contract and its punctual performance, the company paid Seymour & Company $15,000 cash bonus at the time of its execution, and agreed to pay "the further sum of fifteen thousand dollars *when the first sixty miles of said road shall be fully completed, as herein and in said contracts provided.*" (Record, 9, 11.)

They also raise the pay for corduroy, track-laying, &c. (Record, 10, 11.)

And further to enable punctual performance, it was mutually agreed, "that when corduroys are laid, the second party shall put down the track, and go directly on, leaving the cuts narrow, as may be directed by the engineer, and that said first party may take the track as laid on corduroy and raise it to grade, *the object being not to allow said second party to go back*, AND THUS LOSE TIME." (Record, 13.)

And also "that the work of clearing and corduroying shall be prosecuted *during the winter months*, as far as the same may be, in the opinion of the engineer, practicable, *and that part of the work shall be completed by the first day of May*, 1873." (Record, 13.)

And further, to constrain punctual performance by the contractors, it was agreed that the $15,000 bonus which was to be paid on the completion of the first sixty miles, and the fifteen per cent. reserve from the monthly installments was "to be left in the hands of the first party, and held by it as additional security for the performance of the contract, and to be forfeited to it and applied toward the payment of any claim for damages *for failure by said second party to have the work of construction of the road* COMPLETED IN THE TIME ABOVE SPECIFIED." (Record, 14.)

And also "that the second party shall at all times keep and maintain on said work, at the proper points on the line thereof, a force of men and teams, efficiently equipped and properly cared for, sufficient, in the opinion of the engineer of the said railroad company, TO COMPLETE THE WORK ON THE SAID SEVERAL SECTIONS OF SAID ROAD WITHIN THE TIME LIMITED THEREFOR; and that in default thereof the said engineer may from time to time make his requisitions, in writing, on said second party to increase its force of men or teams, or both; and in case of failure to comply with any such requisition, in whole or in part, *within ten days* thereafter, the first party shall be, and hereby is, authorized, and at the proper cost and charge of the said second

party, to supply any such deficiency in men or teams." (Record, 15.)

It is to be observed, also, that the Construction Company execute this July contract "for and in consideration of the assignment of said contracts (the September and January contracts with Hopper, Boyle & Company) to said second party hereto, (M. T. Seymour & Company,) *subject to the conditions thereof, except as hereinafter modified*, ... and of the covenants and agreements in said contracts on the part of the second party thereto, TO BE FULLY KEPT AND PERFORMED BY THE SAID SECOND PARTY HERETO, except as hereinafter modified and changed." (Record, 9.)

But, on the other hand, the contractors executed this July contract "for and in consideration of the assignment of said contracts to it, and of the sum of fifteen thousand dollars in hand paid, and of the sum of fifteen thousand dollars to be paid as herein provided, and *of the covenants and agreements by the said first party in said contracts and herein contained*," [NO ALLUSION BEING MADE TO PERFORMANCE;] and expressly covenant that they have "taken the said assignment of said contracts subject to the conditions, covenants, and agreements therein on the part of the second party thereto to be kept and performed, *and will keep and perform the said covenants and agreements in all respects*, except as the same have been modified and changed by the covenants and agreements herein contained on the part of the parties hereto." (Record, 11.)

It is also to be observed that the July contract, on which this suit is brought, fixes no time, for payment by the Company, of monthly installments, but leaves the times, conditions, and manner of those monthly payments to be determined by the provisions of the September and January contracts already quoted.

And those provisions merely require the company to pay "on or about the fifteenth day of every month;"

1. After performance of the stipulated work;

2. When, in the chief engineer's opinion, it is completely finished and performed;

3. And the chief engineer has furnished to the company "a certificate of the fact under his hand;"

4. And an estimate of the quantity of work, "*which estimate is final and conclusive between the parties;*"

5. Within fifteen days after the engineer's certificate and estimate have been furnished to the company;

6. "The sum which may be due under this contract, *agreeably to said estimate*," at certain stipulated prices for various kinds of labor and material for all work done the previous month. (Record, 26, 28, 61, 62.)

7. And the contractors were to be paid, in this manner, "*only for the actual work alone and materials furnished.*" (Record, 28, 63.)

The contracts under which the defendants in error now sue, while they fix exact times for the completion of the work and its several sections, and fortify those times by various conditions precedent to any payment, and careful provisions and inducements to punctuality in performance, and penalties for want of punctuality, *contain no provision for paying monthly installments, except as above stated, and do not require any payment to be made until after the performance of the conditions precedent above stated.*

The September and January contracts contain provisions (common in all such contracts, in order to guard against contingencies) which relate to changing the modes and amounts of work, changing the line, stoppage of work at will of the defendant or the engineer, placing the force of contractors by the engineer on such portions of the line as engineer might select. But if those contingencies shall arise, or any delay be caused by the company or engineer through those provisions, (WHICH IS NOT PRETENDED TO HAVE BEEN DONE IN THIS CASE,) the contract expressly provides that the contractors shall be entitled "*to an extension of the time allowed for completing this work sufficient to compensate for the detention,*" and expressly indicates how that ex-

tension of time shall be determined, and the means which the contractors must take to obtain it. Record, 49, 50, 85, 86.

What Was Done Under the Contracts.

The contractors, after making the contract of July 18, 1872, began work between sections 18 and 19, to which point the iron had been previously laid, each mile counting as a section. (Record, 167.)

From the outset, they did not put men enough or teams enough on the line to complete the whole work in contract time. (Record, 174.)

On August 5, 1872, the chief engineer of the Railroad Company, Mr. Wellman, notified them in writing that "in order to complete the first forty sections of your contract within the time specified," they must increase their effective force of shovelers to 412, and of teams to 37, from and after August 10, besides the men and teams required for grubbing, clearing, corduroying, building and moving camps, and getting up supplies.

On August 19, 1872, the chief engineer again notified them in writing that, to finish the second section of twenty miles, even by October 15, [*a month later than the contract specified,*] "you will require an average of not less than 578 shovelers from and after the 1st day of September." (Record, 175.)

On August 24, 1872, they received from the chief engineer the following notice:

"Stevens' Point, *Aug.* 22, 1872.

"M. T. Seymour & Co.

"Gentlemen: On the 19th inst. you were notified that according to our estimates you would be required, from and after September 1, to have at work on sections 40 to 60, inclusive, 578 shovelers, with necessary teams, in order to

complete the work by October 15, which is 30 days after contract time.

"As yet no material increase of force has been made, and as there is not a moment to be lost, notice is hereby given that if within ten (10) days from this date the requisite force is not on the work, or there are not unmistakable indications that it will be on in time, this company will be obliged to avail themselves of the provisions of the 5th section of the supplementary contract, dated July 18, 1872, to take steps to supply the deficiency, and charge the cost of the same, whatever it may be, to you.

"Very respectfully, yours,

"D. W. WELLMAN,

"*Chief Engineer.*"

These notices were all disregarded.

Until after September 15, the contractor's own force was all below section 40. (Record, 176.)

Prior to October 15, there were not 578 shovelers at work on sections 40 to 60 inclusive. (Record, 176.)

Mr. Alexander, the principal contractor in charge, admitted at the trial that there were not more than 207 shovelers on the work September 28th. (Record, 177.)

These letters were written by the chief engineer in discharge of his duty as engineer. Alexander admitted that the first was written with his own knowledge and consent, in order to stimulate his sub-contractors.

"But the letter of August 24 was written as a warning to the contractors to make effort to have the work finished." The chief engineer expected the contractors would put more men on the work between section 40 and section 60 before finishing the road up to section 40. He "verbally and constantly urged Alexander to increase his men and teams. The force was small, compared with what it should have been—*not half as large as it ought to have been to complete the work.* The letter of August 24th was sent *because there hadn't been such increase of the force as was required by the previous letter.* The contractors could have worked with

advantage two or three times the force they had. None of them superintended the work but Alexander, save that Seymour did to some extent for a time." (Testimony of Chief Engineer Wellman, Record, 186.)

When the company paid the contractors on October 15, Mr. Phillips, the president, called in Mr. Pratt, the company's auditor, and in his presence told Mr. Alexander that the payment on account of the work north of the first forty miles was under protest, the company reserving its rights under the contracts. Phillips told Alexander at that time that the company was not satisfied with the progress of the work. And Reed, the company's attorney, told Alexander, early in October, that he couldn't claim that there was anything due on the contract; but if company paid, it would do so under protest, and reserving the company's legal rights. (Record, 192, 203, 197.)

On November 9 and 10, 1872, (Saturday and Sunday,) the great fire in Boston occurred. The company's financial assets and principal office and resources were in Boston. Mr. Phillips had gone there to get money, but the fire prevented his receiving it. Mr. Alexander testified that Phillips came back with the news that: "The Friday before the fire, arrangements had been made with a gentleman in New York, to place to the company's credit $1,000,000 the next Monday; but when Phillips went to New York to get the money, the fire happening meanwhile, the gentleman who was to deposit the money declined to do so, saying he did not know what effect the fire might have upon the financial world. Witness (Mr. Alexander) continued to call upon Phillips afterwards to learn of success in negotiating money, Phillips requesting witness to have courage, as there would be good tidings, which were expected almost daily, and so matters continued, until Phillips, with Reed, attorney of the Wisconsin Central Railroad, went east a little before December 14, 1872." (Testimony of Alexander, Record, 171.)

THE CIRCUMSTANCES UNDER WHICH THE CONTRACTORS STOPPED WORKING.

The contractors' work was entirely suspended November 28, 1872. (Record, 168, 181, 232.)

At this time about half the grading from section 40 *to section* 60 *had been done*; some cuts between section 46 to section 53 had not been taken out, and, with the force the contractors had, the 60 miles would have required, for completion, until January 1, 1873. (Record, 181, 185.) But the contract required the road to be completed through section 60 "*on or before September* 15*th.*" (Record, 12.)

No arrangement, written or verbal, to extend the time for completing the work under the contract of July 18, 1872, was ever made. (Record, 202, 203.)

When the contractors stopped work (November 28, 1872) the laborers became unruly, because the contractors did not pay them. It was feared they would tear up the track and burn bridges. They remained on the line three weeks and a day, not working, but in a state of insubordination, having torn up some rails and seizing cars and keeping the bookkeeper a prisoner. These facts were reported to Alexander. (Testimony of Alexander and of Quinn contractors' bookkeeper, Record, 171, 195.)

The contractors voluntarily elected not to pay their laborers until the amount due the contractors from the company had been exactly determined.

"They could have gone on with the work without any trouble, but they did not feel inclined to do so until paid." (Testimony of Alexander, Record, 178.)

The contractors "declined to pay the men from their own resources, *as Rutter said he thought they might do*, so declining, however, because, as he said they did not, propose to build the railroad at their own expense and out of their own pockets, and said Rutter not being willing to

involve himself personally nor to guarantee to prosecute the work *until the contractors had a positive settlement in regard to the amount then due them.*" (Testimony of Alexander and Rutter, Record, 179.)

This voluntary neglect and refusal by the contractors to pay their workmen was in violation of their express covenant in the July contract, that they "will at all times keep and save the said first party harmless against all claims and damages which may be made upon the said first party, or the said Wisconsin Central Railroad Company, for the price of labor, work, materials, or supplies, performed, done, or furnished to or on account of the second party to said contracts." (Record, 13.)

Before Phillips and Reed went East they asked Alexander to keep the laborers quiet, and offered him some Portage county bonds to keep them quiet;" and Phillips remarked that he believed defendant was ruined, and did not know whether defendant could get a dollar to go on with the work; that this was all in consequence of the Boston fire, and he regretted that he had not stopped the work in September or October." (Testimony of Alexander, Record, 171.)

But when Phillips and Reed returned from Boston to Chicago, about December 14th to 17th, Phillips brought with him about $150,000 in money, and wanted to know how little money the contractors could get along with. "Alexander said they could get along with $75,000 on a pinch, and Phillips said he could not let them have more than $40,000, if so much, and that only if they would go to Stevens' Point and there receive the money in installments *and pay it out to the men, which the plaintiffs* (the contractors) *declined to assent to, not agreeing to bind themselves to make such an application of the money.* But Alexander and Rutter proposed at the time that if the defendant would pay $60,000, or, as they said, *half of what defendant owed them,* plaintiffs would give time FOR THE RESIDUE, IF SECURED.

Phillips proposed to turn out first mortgage bonds of the Wisconsin Central R. R. Co. at 75 cents on the dollar, to raise, by hypothecation, means to pay all the laborers, and also to give $40,000 of Portage county bonds for doing it. But Alexander and Rutter declined to try to negotiate the bonds or to pay the men out of their own resources. (Testimony of Rutter and Alexander, Record, 179.)

And would not agree to prosecute the work further until settled with for what had been done. (Testimony of Rutter, Record 179.)

And also demanded the 15 per cent. reserve and the $15,000 cash bonus, as if the first sixty miles had been finished. (Testimony of Rutter, Record, 180.)

And refused to go to Stevens' Point to assist in paying off the laborers; Phillips stating that, if they did not take the money for that purpose, some one would go up there and pay the men off, and Rutter urging that if Phillips took the responsibility of paying the contractors' liabilities he must do so at his peril. (Testimony of Rutter, Record, 180.)

They took away their books from section 46 when the company's agent paid off these laborers on December 19 and 20, 1872, and would not even allow him to see the books in order to pay off the laborers; though their book-keeper noted the payments in their books for the contractors' benefit. (Testimony of Quinn, Record, 196.)

Alexander protested against having the men paid by the company or under its supervision, and insisted that the money should be paid in Chicago, and that he should have $75,000 before he would talk of going up on the road; and refused the proposal that he, Alexander, should go up to Stevens' Point for that purpose, and there receive the $40,000. (Record, 199.)

In these interviews, between December 14 and 17, (after

Phillips and Reed returned from the East with $150,000 in money, and before the men were paid off on December 19 and 20,) Alexander claimed about $120;000, as then due the contractors, but Phillips did not admit any such amount as being due. (Record, 200.)

The proposal of Alexander and Rutter to accept $60,000 in cash, and give time on "the half of what defendants owed them," *was only on condition that the other half* "WAS SECURED." (Testimony of Alexander and Rutter, Record, 179.)

While thus negotiating in the middle of December, and neglecting to pay their workmen for October and November work, they evidently designed to enforce upon the company their demand for $120,000 by adding to the pecuniary embarrassment of the company the additional pressure of workmen's riots and destruction of bridges and track along the line. "Had the company paid, they would not have objected to going forward." (Record, 171, 178, 179, 195.)

But they did not produce the "estimates" and the "certificates" which their contracts required as conditions precedent to payment by the company.

The current "*monthly estimates*" (which were produced subsequently at the trial) were not the "*final estimates*" required by the contract to be furnished by chief engineer before any payment was due from the company. (Record, 26, 166.)

The engineer's "certificate" (as given in Record, 166) was essential; and "no such certificates accompanied any of the estimates on this road for work above section forty." (Record, 167.)

Until produced, the company did not agree to pay. (Record, 26, 61.)

The "monthly" estimates (when produced at the trial)

showed the amount of credit for work done in October: (Record, 162, 163, 164.)

No. 1196	$35,607.96	
" 1197	4,135.57	
" 1198	3,088.96	
		$42,832.49

And for work done in November:

No. 1304	$3,149.64	
" 1305	4,939.78	
" 1306	15,519.81	
		23,609.23

And for work previously done, but not estimated and returned until December:

No. 1473	$5,599.51	
" 1474	2,328.43	
" 1475	2,114.05	
		10,041.99

Making the total due on "monthly estimates" to December 31, 1872 ---------- $76,483.71

From which the company was entitled to deduct payments made on contractors' account by company:

Nov. To Chicago and Northwestern Railroad Company, (Record, 172,)	$3,453.75	
Dec. 19. To laborers of contractors, (Record, 195,)	26,869.00	
Dec. 19. To laborers of sub-contractors, (Record, 207,)	6,215.13	
Dec. 31. To Whitman & Perkins, (Record, 187,)	4,990.60	
	41,528.48	
And the 15 per cent. reserve from the monthly estimates (which was not payable until the work was finished)	11,472.55	53,001.03

Balance of credit to contractors on December 31, 1872		$23,482.68
Therefore, on December 14 to 17, when Messrs. Alexander and Rutter demanded $120,000, of which $60,000 must be paid in cash and the residue "secured," the "monthly estimates" really gave them only		$76,483.71
From which, deducting the November payment to the Chicago and N. W. R. R. Co. on their account	$3,453.75	
and the 15 per cent. reserve, to be held back (under contract)	11,462.55	
		$14,926.30
there would remain (if the "conditions precedent" are disregarded) a balance in their favor of		$61,557.41
But Mr. Phillips then offered to pay		40,000.00
So that, even if the "conditions precedent" were all disregarded, the total balance to their credit did not then exceed		$21,557.41

In other words, in demanding $120,000 on December 14 to 17, 1872, Messrs. Alexander and Rutter claimed $58,442.59 *more than was then due, in any aspect of their contract, even if the Company chose to waive all the "conditions precedent to payment," which the contract had established for their protection against precisely such claims.*

And because the company refused to secure them this *fifty-eight thousand four hundred forty-two $\frac{59}{100}$ dollars, to which they had no rightful claim*, the contractors voluntarily threw up their contract; left 500 unpaid laborers to shift for themselves in a wilderness; abandoned all their property, tools, and supplies, without an effort to save anything, and elected to sue, on their contract, in a plea of breach of covenant, "a corporation, without personal responsibility or property beyond the bonds of an uncompleted railroad

located in the wilds of northern Wisconsin." (Record, *passim;* Brief of defendants in error, p. 43.)

This was a singular choice, if they really believed that corporation to be insolvent.

They did not so believe; and the fact was otherwise.

On November 28, 1872, (the day when the contractors stopped work,) Alexander telegraphed up the line, "*I consider the company perfectly solvent, and will be in funds, in a few days.*" (Record, 196.)

This telegram was based on conversations with Phillips as to the financial condition of the company, in "which Phillips had expressed the hope and assurance of getting money and promised funds to pay the estimates." (Testimony of Alexander, Record, 207.)

These hopes and assurances were well grounded. The company continued work on the road during the winter of 1872 and 1873, and was at the time of trial continuing work. (Record, 209.)

In December 14 to 17, when the contractors refused to resume work, the company was not, in fact, insolvent, though it was temporarily pressed for ready money, in consequence of the great fire in Boston, (November 9 and 10, 1872,) and the financial panic consequent thereupon in Boston, where its principal office and resources were. (Record, 200.)

It had at that time in Boston $1,631,250 of the first mortgage bonds of the railroad company, *which possessed a market value of ninety cents on the dollar*, and $240,000 town and county bonds of various municipalities in Wisconsin, *worth eighty-five cents on the dollar*, besides receipts from operation of the road already built, (Record, 200,) and all the resources of the railroad company were at its disposal, (Record, 199,) and it had $150,000 cash on hand, part of which was paid out to the company's own employees on the north end of this line, and part used in

paying the contractors' debts and taking care of their property. (Record, 200.)

The contractors refused to accept as security the railroad bonds at 75, which were proved at the trial and *admitted in the pleadings* to "have a market value of ninety cents on the dollar. (Record, 200.)

The Construction Company at no time objected to the contractors' continuing the work, but, on the contrary, expressed a desire to have it pushed. (Testimony of Alexander, Record, 168.)

They never asked the contractors to consider the contract abandoned, or said they did not intend to go on with the work, or would not receive any work from the contractors, or that in future they did not expect to be able to make any payments. Phillips expressed some fear that he would not get money, yet requested that the contractors would hold their men. The company never at any time told the contractors to stop. (Testimony of Alexander, Record, 177, 178.)

They told the contractors they would do anything and everything that was reasonable for the prosecution of the work, and give securities, if the contractors wanted them, for protection. (Testimony of Reed, Record, 200.)

They asked the contractors to keep on doing work after November 15. (Testimony of Alexander, Record, 177.)

The company never notified the defendants in error that the work had been abandoned, but notified them to the contrary. (Testimony of Phillips, Record, 209.)

But when Phillips asked Alexander *whether the contractors would go on with the work, or wished to do so, when the company was prepared to pay, Alexander answered that he thought not, without some new arrangement.* (Testimony of Phillips, Record, 208.)

The company paid the contractors punctually until November 15, 1872, just as if they had duly performed. But on that day the contractors were in default, viz:

1. They had agreed to finish the first section of forty miles of railroad westerly from Stevens' Point on or before September 1, 1872, (Record, 12,) but they did not finish the first forty miles until September 30, 1872. (Record, 166.)

2. They had agreed to finish the second section of twenty miles on or before October 15, 1872, (Record, 12,) but they had done only a small portion of it by that day, and never finished it at all. When they stopped work altogether it was not more than half graded. (Record, 167–180.)

3. They had agreed to finish the third section of twenty miles on or before November 15, 1872, (Record, 12,) but they never finished any part of this section, and did very little work on it at all. (Record, 163, 167.)

4. Notwithstanding repeated notices from the chief engineer, they had, from almost the commencement of work, neglected to put on enough men and teams. The chief engineer testified: "The force was small compared with what it should have been; not half as large as it ought to have been to complete the work."

And when the contractors stopped work (November 28, 1872) the company was only *thirteen* days behind time in making a payment which is not rigidly prescribed for a particular day in the contract.

And the principal contractor, Alexander, *on that very day believed, and telegraphed up the line his belief, in the entire solvency of the company.* (Record, 197.)

And when, on December 14 to 17, the contractors abandoned, "in the wilds of Northern Wisconsin," their 500 laborers, interposed every obstacle in their power to prevent the company from paying these men and getting them out

of the forest, and refused to take any measures to save the road or their own plant from destruction, they deliberately refused to accept $40,000 in money for immediate payment to those laborers, and security for other actual indebtedness. Rejecting all requests of the company, they then voluntarily refused to go on with the work "without some new arrangement," and an admission by the company of their claim of $120,000, and being "secured" for a balance of that claim, the nature of which has already been shown.

The Proceedings in Court.

On the 17th February, 1873, Seymour & Company brought this action on their contract in a plea of breach of covenant.

In their declaration they did not, after setting forth the contracts, allege full performance thereof, but averred that until December 15, 1872, they prosecuted work with all the skill and energy they possessed, and until that date the company "*had expressed entire satisfaction*" with the manner in which the work was doing and with the rate of progress; and that all the work so done "*was approved by the chief engineer as being in entire conformity*" with the contracts; and that on December 15, 1872, they had actually completed, "*to the satisfaction of the said chief engineer and of the defendant*," fifty-three miles of the railroad westerly from Stevens' Point, and nearly finished seven miles more.

They then alleged that on December 15, 1872, while they were "actually and successfully prosecuting said work," and while the company was largely, to wit, $250,000, indebted to them for work already performed, the plaintiffs were suddenly, without any previous notice of the company's embarrassment, "notified by the defendant that it was unable to pay the sum last aforesaid due to the plaintiffs, or any part thereof, and was wholly destitute of means to make future payments upon said contracts to the plaintiffs, and so left the plaintiffs to shift for themselves and save what they could from the wreck of the undertak-

ing; and ever since that defendant has continued to be insolvent, and has utterly failed and refused to pay the aforesaid sum due the plaintiffs for work done as aforesaid, or any part thereof, whereby the said defendant, by its own fault and without the consent of the plaintiffs or any fault on their part, rendered any further work by the plaintiffs under said contracts impossible, and so the plaintiffs were in fact thereby absolved from all further attempts to perform the same." (Record, 90, 91, 92.)

The company demurred to this declaration because, among other causes, the plaintiffs "do not aver or show a performance by the plaintiffs of conditions precedent on their part, nor do they excuse such performance," nor show any breach or violation of the contracts by the defendant. (Record, 97.)

The demurrer was overruled. The company pleaded in bar and denied the serious allegations of fact made in the declaration, and set up other defense. The contractors replied, and issue was joined. (Record, 102 to 146.)

The facts in evidence, so far as material to the discussion of the errors assigned in this brief, have been sufficiently stated.

They disclose, on the part of the company, a temporary disability to pay a demand, irregularly made by the contractors upon it without estimates and certificates from the engineer, and twice too large, but no disaffirmance of the contract, and no affirmative act of prevention or hindrance to the contractors' performance, and no notice to them to stop work under it, but, on the contrary, great efforts to induce them to continue work.

And, on the part of the contractors, a voluntary stoppage of work at a time when they believed the company perfectly solvent, and a subsequent refusal to resume work, followed by an utter abandonment of their enterprise because the company declined to admit, by part payment and security,

a claim for $120,000, when $61,557.41 was actually at that time the whole balance to the credit of the contractors in their accounts with the company.

Under instructions which appear in the assignment of errors, the jury found a general verdict for the plaintiff for the sum of $107,353 44, and a special verdict for the extra cost of doing certain earthwork by train in the sum of $11,708. The court overruled motion for new trial and motion in arrest of judgment, and entered judgment for plaintiffs in the sum of $119,061 46. (Record, 154, 159.)

The defendant company thereupon brought the case to this court by this writ of error. (Record, 248.)

Assignment of Errors.

Without waiving any of the other errors which are discussed in the brief of my learned associate, and relate chiefly to the improper admission and exclusion of testimony, and erroneous instructions upon alleged items of damage, the following are selected for discussion here:

First. The court overruled the motion in arrest of judgment. (Record, 241.)

Second. The court misconstrued the contract when it instructed the jury, "in view of the whole contract, that the same was flexible, so far that the times therein fixed for completing different portions of the road were not of the essence of the contract." (Record, 218.)

Third. The court misconstrued the contract when it refused to give the instruction asked, viz—

"6. That by the terms of the contracts in evidence, any work done by the plaintiffs was to be estimated by the chief engineer of the Wisconsin Central Railroad, and said engineer was made an umpire to decide all matters arising or growing out of the contracts; and the plaintiffs are, as to work done by them and materials for the same provided, limited to the amounts estimated and stated in his estimates by such engineer, which estimates have been received in evidence; and defendant was under no obligation to pay for any work not included in such estimates. (Record, 212.)

But ruled—

"That the plaintiffs would be entitled to recover all sums of money due for work performed under the contract; that these sums the jury would ascertain mainly from the estimates and the evidence of the chief engineer, as the

most reliable data upon which the jury could make their computation and base their verdict." (Record, 222.)

FOURTH. The court erred in defining what would excuse the contractors for not performing their agreements, and enable them to maintain this action of covenant on their contract, viz, in instructing the jury that—

"If, from the evidence, the jury found that defendant at any time, on or about December 15, 1872, for the precise date was not material, informed plaintiffs, or gave them to understand that defendant was unable to pay the estimates then due for work under the contract, and that it was uncertain or doubtful whether it would be able to pay future estimates for work, then the jury would be justified in finding that the breach alleged against defendant was proved, and that plaintiffs, by reason of such breach, had the right to stop the work on their part." (Record, 221.)

And in framing the second special question put to the jury—

"Had the defendant, at the time plaintiff stopped the work in question, given the plaintiff to understand that defendant was financially unable to pay the estimates then due, and would probably be unable for a time to pay future monthly payments?" (Record, 240.)

FIFTH. The instructions which were given as to "estoppel" and "waiver" were incorrect, viz—

"That if defendant recognized the contract as in force after default by plaintiffs, defendant was estopped, as it were, from subsequently setting up that failure in point of time. And if, therefore, the plaintiffs were continually in the performance of the work with the consent, express or implied, of defendant at the time of the alleged breach by the defendant, then the defendant should be held to have waived any such breach or shortcoming on the part of the plaintiffs prior to that time; in which case defendant would be estopped by its own act from setting up the previous failure of plaintiffs as an answer to defendant's own failure." (Record, 218.)

"That the first issue which the court thought material for the jury to consider was, whether the defendant had excused or waived whatever breaches or violations of contract had been committed by plaintiffs prior to the date of the alleged breach by the defendant. And as to this, the court ruled that if, at the time of such alleged breach on the part of the defendant, the plaintiffs were, with the consent of the defendant, engaged in fulfilling and performing the contract, then the defendant had waived default on the part of the plaintiffs as to the time for completing the several parts of the road, to wit, the third twenty miles on the 15th of September; the fourth twenty miles on the 15th of November; and the fifth twenty miles by the 15th of December." (Record, 219.)

"That it was not necessary that there should be a written waiver, nor even a waiver in express terms, by any set formal words, but it might be by the conduct of the parties, as treating the contract still in force, paying the estimates, and agreeing to the terms of the contract, which were circumstances tending to prove a waiver and excuse." (Record, 220.)

SIXTH. The company was entitled to show that it had made its previous payments to the contractors without prejudice to its rights under the contract, and the court erred in ruling that the testimony "as to money being paid plaintiffs under protest, was immaterial; that the conversation testified to by Phillips and Pratt in that regard, as aforesaid, was not to be regarded as a protest of any avail to defendant, nor as tending to constitute any defense." (Record, 209.)

SEVENTH. The company was entitled to show that it was, in fact, solvent; and the court erred in ruling "that it made no difference how much funds the defendant had, for the question was whether the defendant paid or not." (Record, 201.)

Points and Authorities.

I.

The times specified for completing the road and the several sections of the road were of the essence of the contract in suit. The contract itself declares this intention of the parties. The situation and conduct of the parties, the circumstances in which the property was placed, and the subject-matter of the stipulations, show the necessity and prove the fact of this intention. The intention of the parties governs.

Slater *v.* Emerson, 19 Howard, 224, 237.
Dermott *v.* Jones, 23 Howard, 220, 231.
Stinson *v.* Dousman, 20 Howard, 461, 466.
Shaw *v.* Turnpike Co., 2 Pa. R. 454. [1831.]
Same *v.* Same, 3 Pa. R. 445.
Warren *v.* Bean, 6 Wisconsin, 120.
Brazier *v.* Gratz, 6 Wheat, 528, 533.
Heckard *v.* Sayre, 34 Illinois, 142.
Stow *v.* Russell, 36 Illinois, 36.
Hill *v.* Fisher, 34 Me. 144.
Hill *v.* School District, 17 Me. 310.
Allen *v.* Cooper, 22 Me. 133.
Bank of Columbia *v.* Hagner, 1 Peters, 455, 465.
Fitzgerald *v.* Hayward, 50 Mo. 516, 524.

II.

The furnishing to the company of certificates and estimates from the chief engineer was, by the contract, made a condition precedent to the contractor's right to receive payment. The parties had fixed upon this mode of deter-

V.

The instructions given upon waiver and estoppel were not applicable to this case, and tended to mislead the jury. They relieved the plaintiff from the burden of proof which legally rested upon him.

VI.

The plaintiffs alleged the insolvency of the Company as prevention to the contractors from performance, and the Company was entitled to rebut prevention by disproving the alleged insolvency.

VII.

The Company was entitled to show that it made the October payment under protest, and without prejudice to its legal rights growing out of previous breaches by the contractors, in order to rebut the waiver of those breaches which the court ruled that payment implied.

First. Before the contract in suit was made, the Construction Company had agreed to build about 320 miles of this railroad. The valuable land grant of the Wisconsin Central Railroad Company depended, by the terms of the grant, upon the whole railroad being finished in less than two years from the date of the July contract with Seymour & Company. If not so finished, the Company was in default; and the opinion of the Attorney General of the United States was well understood to be that in such grants the completion of the road by the time fixed in the act was necessary to prevent a lapse of the grant. The Statutes at Large, at this period, show how generally it was considered essential to obtain extension of time from Congress in order to save such grants from absolute forfeiture upon breach of this condition. That this Company shared the general belief, appears from their seeking and obtaining such an extension in this grant from Congress on April 9. 1874. The fact of this opinion is one circumstance which indicates the intention with which the contracts in suit were framed, and exact dates fixed in them for completing the several sections of this road.

The fact of the grant itself tends to make time of the essence in the contracts in suit, from the mere nature of the subject-matter of the bargain.

In *Shaw* v. *The Turnpike Company*, 2 Penn. Rep., 454, 460, [1831,] the contractor sued on a contract in which he had agreed to finish "at or before the first day of September, 1818," part of a turnpike for the defendant company. Their charter provided "that if the company shall not proceed to carry on the said work in *three* years after the passing of the act, or shall not within *seven* years afterwards complete the said road, &c., all and singular the rights and liberties, &c., shall revert to the Common-

wealth." No reference was made in Shaw's contract to this provision of the charter. But the court say: "In the case before us it may indeed be said that time is of the essence of the contract, from the very nature of the subject-matter of the agreement, being to do that which the act of Assembly required to be done by a fixed and certain day. The provisions of the act of Assembly, the subject-matter of those provisions, and the covenants of the parties, all tend to prove that time was an essential part of the contract."

The bargain between the Railroad Company and the Construction Company also shows this intent and its necessity.

The United States issued to the Railroad Company patents for lands no faster than twenty-mile sections of consecutive road were finished. The first mortgage bonds of the Railroad Company (which covered all the road, built and to be built, and all the lands) were paid to the Construction Company only upon completed road, at the rate of $25,000 per mile. The value of the bonds and their saleability, when received, depended largely upon the lands they covered. The finishing, therefore, of the several twenty-mile sections of road which the contracts in suit described, at the several times specified, was manifestly of great importance to the Construction Company.

Until the section was finished, the Railroad Company could not get its lands; and, until it got its lands, its bonds lacked an important element of value. Any delay, therefore, in getting the lands acted at once upon the market value and saleability of the Construction Company's assets; and any delay on the part of Seymour & Company in completing sections of road at the specified times, delayed not only the getting of lands into the bonds, but the obtaining of bonds themselves, and consequently impaired the financial ability of the Construction Company to pay its contractors, while every day's delay diminished the chance of finishing the railroad soon enough to secure

the land grant. Hence, in each of the contracts with Hopper, Boyle, and Seymour, precise times for completing twenty-mile sections are designated; and in the July contract the defendants in error are not only bound to finish the several sections on exact days, but are promised a bonus of $15,000 cash when they shall finish the first sixty miles "as herein and in said contracts provided." Hence all three of these contracts are full of references to time for completing the work and its several sections; and a method is prescribed in which the contractors may obtain an extension of time if any act of the Construction Company entitles them, in the opinion of the Chief Engineer, to ask it, but not otherwise.

In *Brazier v. Gratz*, 6 Wheaton, 533, Chief Justice Marshall remarked, as to the rule in equity on this subject:

"The situation of the parties and the circumstances in which the property was placed deserve serious consideration." * * * "If it seems that the whole value, or a material part of the value of the transaction to the defendant, depends on its being done at a certain day and no other, or that the substitution of any other will subject him in any way to loss or material inconvenience, then time is certainly of the essence of the contract."

But, to borrow the language of Baron Alderson, in *Hanslip v. Padwick*, 5 Exch., 623:

"At law, time is always of the essence of the contract.'

Sugden says this has never been doubted in practice; and this court has accepted the doctrine, and quoted Sugden's words in the case of *Bank of Columbia v. Hagner*, 1 Peters, 455, 465.

And when, "in an action at law, the question is whether a party has performed his part of a contract which required performance within a certain time, the courts cannot say that that is immaterial which the parties by their contract have made material." (Hill *v.* Fisher, 34 Me., 144.)

And while the intention of the parties governs the construction of all contracts, and contracts have the same

meaning in law as in equity, and the intention which governs is that intention which the parties have expressed in words; still "all that relates to the conduct of the parties and to the nature and circumstances of the case, and the particular subject-matter of the stipulation which makes time of the essence of the contract important, are all matters that must be dealt with according to the evidence before the court and the statements upon the record." (Vice-Chancellor Wood in *Earl Darnley* v. *London, Chatham and Dover Railway Co.*, 33 L. J., Ch. 9, 13, note.)

The intention of the parties, as it appears in the passages quoted in the Statement of the Case, seems hardly to require illustration from external circumstances. The allusions to time, and the saving of time, and the completion of the road and all its several sections at the specified times, are so frequent, that it was hardly needful to provide expressly how, in case of unavoidable detention, the contractors might get extension of time, in order to negative the inference that it could be got in any other way. This court has repeatedly held time to be of the essence in contracts where the expressions were much fewer and weaker.

In *Slater* v. *Emerson*, 19 Howard, 224, 237, 238, after discussing, first, the circumstances under which the contract was made, the court examine the consideration clause, and hold the words in consideration "*of the premises*" to be equivalent to "*the completion of the work*," and say: "There is no ambiguity in this language. No one can misconstrue it. The work specified was to be completed by the 1st day of December. * * * * * That time was an essential part of this contract is clear from the circumstances under which it was made, and the intent of the parties as expressed."

In *Dermott* v. *Jones*, 23 Howard, 220, 231, the court say: "The words of the contract are '*in consideration of the covenants and their due performance.*' Such words import a condition." They held that by the terms of the contract the performance of the work was a condition precedent to the payment of the money sued for.

In *Stinson* v. *Dousman*, 20 Howard, 461, 466, the court affirmed, in what was substantially a suit in equity, the judgment rendered below on a contract for the sale of land; and Mr. Justice Campbell, in delivering the opinion of the court, after stating the liberal rule which this court applies in equity to such contracts, continued: "But if the parties have declared in their contract that time is a material consideration, and have agreed that their rights shall depend upon a scrupulous fidelity to their engagements, it does not belong to the court to make another law for the parties. Where it plainly appears that the sale is conditional, and its completion is dependent upon the fulfillment of any of the terms with punctuality by either party, a court of equity, in general, will not interpose to relieve the party in default, on the principle that time is not of the essence of the contract."

"In the case before us the contract recites that the vendor, in consideration of," &c., "and upon the *express condition* that the defendants do well and faithfully perform the covenants and agreements thereinafter mentioned, agreed," &c.

The language of the consideration clause in the July contract now in suit, and the express covenants of Seymour & Company to perform, are at least as strong, if not stronger, expressions than any of the terms on which, in these cases, time was held to be of the essence by this court.

But, although, *ex abundanti cautela*, the contracts in suit are framed so strongly as to make time of performance an essential element in them, even upon the principles of construction which are applied to contracts for the sale of land, they are contracts for the performance of work; and this fact, almost in itself, implies that the time named for completion of the work is an essential condition.

In *Warren* v. *Bean*, 6 Wisconsin, 119, the contractor had agreed to perform certain labor in enlarging the slide, and improving its capacity for running lumber, at Big Bull

falls on the Wisconsion river, "during the present winter, and to complete the same in time for the first water of the coming spring." He did not finish the work until the next fall or winter, and then sued in covenant on the contract. It was contended that time was not material; but the court said: "The consideration for the defendant's undertaking was the performance of the work according to the terms of the contract; and most certainly the time in which the work was to be done was as much a condition as the manner in which it was to be performed. It is quite true that there is a certain class of cases, such as where money is to be paid on a particular day, in which courts of equity will hold that time is not material, or of the essence of the contract, so as to defeat a party's rights who fails to pay the precise day the money becomes due. But the doctrine of those cases has no application whatever to the one under consideration. Here it does not admit of doubt but that the time of doing the work was a most essential condition of the contract."

Had the defendants in error performed their contract, this entire railroad would have been finished on October 1, 1873. How great was the actual importance to the plaintiffs of punctual performance by the contractors, this date shows. Its punctual performance would have finished their railroad before the late panic and financial disturbance and era of railroad embarrassment began.

Had the defendants in error finished the sections, amounting to eighty miles, which they had agreed to complete by November 15, 1872, (the earliest date of alleged default on part of the Construction Company,) the Company would have received payment for at least thirty additional miles of finished road and have had about $750,000 more bonds, on which and out of which funds might have been raised to pay these contractors on that day. The contractors' defaults (prior to November 15, 1872) directly diminished the amount of saleable assets of the Construction Company to at least this extent on that day, and impaired the market value of all the bonds which the Company

the work for the accommodation of their men, and necessary for the prosecution of said work.

4th. The cost of a supply road built along said railroad line by plaintiffs, to facilitate the hauling of supplies and material for the prosecution of said work.

5th. Cost of taking care of tools after stoppage of work.

6th. Depreciation in value of tools, teams, &c., &c., then on work.

7th. Loss of profits and gains plaintiffs would have made on work if they had been allowed to complete same.

I do not deem it necessary to analyze in detail the fifteen pleas filed by defendants, as their defense set up under these pleas is substantially and more briefly stated in the following points:

1st. A denial of the breaches of the contract, alleged by the plaintiffs.

2d. A denial that by the alleged breaches plaintiffs have sustained any damage.

3d. That plaintiffs have not kept and performed their part of said contract, and therefore have no right of action against defendant.

4th. The payment of large sums of money to laborers employed by plaintiffs on said work, and for supplies furnished plaintiffs for carrying on said work, which defendant claims should be set off against whatever demand plaintiffs have against defendant.

5th. A denial of plaintiff's right to recover the special damage obtained, or any part thereof.

To most of the pleas interposed plaintiffs have joined issue,

but to the plea or pleas which allege that the plaintiffs had been guilty of breaches of the contract at and before the breaches complained of by them against defendant, the plaintiff has replied that defendant had excused any omissions on the part of plaintiff to perform the work in strict accordance with the contract, and had accepted the work done by plaintiffs, as a sufficient compliance with the contract. That defendant had not notified plaintiffs that it had elected to cancel said contract by reason of the failure of plaintiffs to comply with any of the stipulations of the contract, and that plaintiffs, at the time of the prevention of the performance of the contract by defendant, was prosecuting the work with such vigor and means as would have enabled plaintiff to have completed said work within the time limited by the contract.

The point raised by this plea and replication is, that even if the plaintiffs had failed to fulfill their part of the contract, yet the defendant had forgiven and waived such breaches on the part of the plaintiffs, and had taken no advantage of the same, to cancel or rescind the contract, but had suffered the plaintiffs to proceed with the work, thereby waiving any breach as against plaintiffs.

And one of the issues of fact, to be found by you from the evidence is, whether the defendant had waived the short-comings of the plaintiffs, in the performance of the contract, so that the same cannot now be asserted as against the plaintiffs.

I do not understand that it is claimed, or insisted upon, as a defense in this case, that defendant had, even prior to the alleged breach set forth in plaintiff's declaration, elected to declare the contract void by reason of any alleged breaches of plaintiffs.

There is no dispute in regard to the making of the contracts

had by preventing the lands, appertaining to two twenty-mile sections of completed road, from passing into the bonds. These defaults of the contractors, and their consequences, tended directly to produce the pecuniary embarrassment of the Company. That any want of punctuality on the part of the contractors in finishing the sections at the agreed times must inevitably tend to this result was manifest when the contracts in suit were made. This fact shows how essential time was in these contracts, and is another circumstance which indicates the intention of the parties.

The question whether the agreement on the part of the Company to pay is, in the contracts in suit, dependent upon or independent of the performance of the contractors' agreements, is too plain for argument. The words of the agreement to pay are quoted in the Statement of the Case, and speak for themselves. They are in striking contrast to the covenant construed in *Philadelphia, Wilmington, and Baltimore Railroad Co.* v. *Howard*, 13 Howard, 307, 339, which the court say is "absolute and unlimited."

To instruct the jury that time was not of the essence in the contract in suit was an error fatal to the verdict. A jury might well find that to be a waiver of an immaterial provision, which would not amount to a waiver of an essential condition.

Second. The passages which have been quoted from the contracts clearly express the parties' intention, that the chief engineer of the Railroad Company should be the sole arbiter between them upon all matters of dispute arising under the contract. Although to give full effect to their intention would conflict with the now well-established rule as to arbitration clauses, and the impolicy of allowing parties to oust courts of their jurisdiction by any agreement *inter partes*, it is competent for parties to prescribe in

a contract for work a method for determining the amounts to be paid for the work done, and to render such determination by a third party a condition precedent to the right to compel payment at all, and an absolute limit to the amount recoverable.

In the case of the *Monongahela Navigation Company* v. *Fenton*, 4 Watts & S., 205, 210, 211, 212, 214, [1842,] the defendant contracted to build a lock and dam for the company. He expended moneys for materials, built shanties and a crib dam, and had at large expense provided other means of work, when the failure of stockholders and the suspension of the United States Bank caused the company to suspend work. The contractor sued to recover value of the contract work and extra work, shanties, &c. The company offered the engineer's estimates as conclusive upon the question of value. The court below admitted the estimates as evidence, but not as conclusive. The court above reversed the judgment on this ground. The facts are similar, and the language of the learned judge is strikingly apposite to the case at bar.

In delivering the opinion of the court, Mr. Justice Ross uses the following language:

"The question then recurs, By whom is the compensation to be estimated?" And this is the main point of the cause. . . . . The agreement contains the following clause: "It is mutually agreed between the parties to these presents, that in any dispute which may arise between the contractors and the company, the decision of the engineer shall be obligatory and conclusive, without further recourse or appeal." This stipulation, or one like it, forms part of every contract with the agent for the public works of the Commonwealth, and it is believed it has been adopted by every private company in the State and in the neighboring States engaged in similar undertakings. Experience, which is the best test, has shown its beneficial effects, and, indeed, its absolute necessity; for, without it, it is next to a certainty the Company would be constantly har-

rassed with vexatious and ruinous litigation. In any contract of this kind, to avoid unpleasant and unprofitable controversy, it has been found expedient at least to clothe the engineer with great power in relation to the conduct of the contractors and the manner of performing the work; and in all cases when disputes arise, it is usual to constitute him the absolute judge. His decisions, to use the language of the agreement, are without appeal, and extend to *any*, and, let me add, *every*, dispute which may arise between the contractor and the company. It must be admitted that the language is sufficiently comprehensive to embrace the present controversy; and, if we are not governed by it, it is because this case forms an exception to the general rule. Here, there is a suspension, or, if you will, a mutual rescission of the contract. A dispute has arisen between the Company and the contractors; and by whom is that dispute to be settled? The answer is, by the engineer; a judge of the parties' own choosing; for the agreement says, when *any* dispute arises it is to be settled on an estimate made by the engineer, and that estimate is conclusive and without appeal. To the question why it does not apply, it is answered, because the company first violated the contract in not providing funds for the successful prosecution of the work. This, it is granted, they were bound to do; and, if the company had acted in bad faith, there would be something in the argument; but, as this is not pretended, and is in truth contrary to every fact in the case, we see but little in the objection. Where the suspension or abandonment, as is the case here, arises from unforeseen contingencies acquiesced in by all parties, the force of the position is not perceived. And this construction, we conceive, is in accordance with the spirit as well as the letter of the agreement, for the contingency which has occurred is precisely one where an intelligent and honest engineer would be most competent to administer exact and equal justice between the parties; and without intending any disparagement to the ordinary tribunals of the country, it is a controversy which, in its nature,

they are least fitted to decide. Had the case been foreseen, we cannot permit ourselves to doubt it would have been expressly provided for, and not left, as it is here, to general words, under a supposition "that these are sufficiently explicit to preclude cavil and prevent disputes." The engineer employed by the company is perfectly acquainted with all the details of the work, and certainly more competent to determine any difficulty which may arise than a jury indifferently selected, and without the requisite information or the power to acquire it. It has been argued that the clause, as to the power of the engineer, is limited to the subsistence of the contract, or when the work is in actual progress. But this view of the case is more plausible than sound. Where the agreement is declarad to be abandoned, and the contract ended, for any of the causes enumerated in the agreement, it will not be pretended the contractor can be permitted to appeal to a court and jury without a previous arbitrament of the engineer, or an offer by one and a refusal by the other to refer the dispute to his decision. An award made by a referee who is appointed by the parties to set a price on an article, is an arbitration recognized by the Roman law as well as the common law, and can only be set aside by proof of fraud by the arbitrator or such gross mistake as may be evidence of fraud. . . . . "This estimate was accordingly made, examined, and approved by the engineer, and formed part of the evidence. In the opinion of the engineer, the compensation allowed was liberal and just, made upon fair and equitable principles; was a compensation for all damages suffered in consequence of the suspension, and for all work performed by the contractors. But whether this be so or not, is not open to question. He was the umpire between them, and it is not pretended it was made in bad faith, nor is there any evidence of gross mistake. . . . .

"It must be recollected that the compensation to which the contractor is entitled depends on the estimate of the engineer; that it is part of the contract that the valuation should be made by him, and that when any dispute arises

between the contractor and the company, his award is final. It is then part of the *plaintiff's* (the contractor's) case, and not matter which comes in by way of defense. From this it follows that it is incumbent on the plaintiff to aver and prove that a valuation or estimate of the work was made according to the requirements of the contract. Such proof is a *sine qua non*, without the benefit of which he is not entitled to recover. It also follows that the court erred in admitting evidence of the value of the work other than the estimate made by the engineer, the only competent authority to investigate and decide it. Thus, if A contracts to build a house for B, in a workmanlike manner, at a price to be fixed, and in a manner to be approved by C, A cannot maintain an action against B without proof that C had inspected and valued the work, or that C had refused to value it, or that for some reason it was impossible the contract in that particular could be carried into effect. And this is reasonable, because it may be, without such stipulation, B would not make the contract at all. Indeed, we need no stronger illustration of the principle than the case in hand; for it is absolutely certain that without this or a similar provision these contractors would not have obtained the contract. We have grounds for believing that the company would not have agreed that in case of a disagreement between them and the contractors, the latter should be at liberty to appeal to the uncertain determination of a jury, where they would have to encounter all the prejudices which are too apt to be entertained against all corporations or monopolies, as they are called, of every description; a tribunal, too, which, from its very constitution, and the nature of the controversies which would probably arise, is utterly unfit, however well-disposed, to do justice between them. Such a contest as this is precisely the one in which a person who is perfectly acquainted with the whole work, and the merits of the case, is most competent to decide. This, at least, was their opinion; and neither party is at liberty to depart from this essential part of the agreement. . . . .

On the whole case, we are of opinion that the plaintiff may, if he chooses, adopt the valuation already made, (by the engineer;) but, if he does, he must abide by it. In that case he cannot be permitted to introduce evidence to increase or in any way affect the compensation which has been already allowed. On the other hand, if he elects to repudiate the estimate, there is an end of his. In that event, there must be a re-valuation of the work by the only competent authority, viz, by the engineer."

The principle is settled that, whenever a contract, under which work is done, provides that the engineer or architect is to estimate the value or amount of work done, and his estimate is declared to be final, neither party can be permitted to impeach it except for fraud, nor to resort to other evidence to prove that value or amount.

It has been established in Illinois, Ohio, New York, Vermont, and Maryland, by adjudications full of learning, and already cited to this point, and in many other American cases.

In England, the question has been presented in various aspects, and the principle has been affirmed in a series of interesting decisions, which cover this entire subject so far as the pleadings and testimony in the case at the bar develop it.

Morgan v. *Birnie*, 9 Bingham, 672, [1833] was an action on a builder's contract, wherein the defendant agreed to pay "upon receiving a certificate in writing" from the architect that he was satisfied with the mode in which the work had been executed. The architect did send a private statements of prices and quantities, but it did not appear that he certified his satisfaction with the work. Chief Justice Tindal directed a nonsuit on the ground that the delivery of such a certificate was a condition precedent to plaintiff's right of action, and the nonsuit was maintained by the full court.

Lamprell v. *Billerica Union*, 3 Exch., 283, [1849] was an

action of covenant on sealed agreement to erect a workhouse, by which the plaintiff was not authorized to do anything beyond the original contract work without written instructions from the architect. The arbitrator found that the whole work was done to the satisfaction of the architect, who required additions to be made, which delayed the completion six months. The architect had given no written directions, but, after the work was done, made a written valuation of the additions. It was proved that the work was executed to the satisfaction of the architects, but the court held that the written directions should have been given before the additional work was done, in order to enable the plaintiff to recover on his contract. "A subsequent written approval is a very different thing from a previous order to the builder." They held that the declaration would be bad after the verdict, if it did not state that such instructions had been given as the contract specified.

Milner v. *Field*, 5 Exch., 829, [1850] was assumpsit upon a written agreement for building thirty houses, which were to be paid for in installments. The contract imposed penalties for non-performance, and provided that none of the installments should be payable unless the plaintiff should deliver to the defendant a certificate signed by the surveyor that the work had been in all respects well and satisfactorily performed according to the specifications and plans. *Some installments had been paid*, and the suit was brought for the balance. No certificate was obtained, but plaintiff offered to prove that the work was in all respects properly done, and that the certificate was withheld fraudulently and by collusion with the defendant. The evidence was excluded, and the plaintiff nonsuited. The court refused a rule, Chief Baron Pollock saying: "Where, by the contract itself, the certificate of a surveyor is made a condition precedent to the right of payment, even if it be withheld by fraud, that is only the subject of a cross-action. The nonsuit, therefore, was right."

In *Ranger* v. *Great Western Railway Company*, 5 Clark's House of Lords Rep., 73, 89, [1854,] the general principle

was not only affirmed, but the Lords held that (no fraudulent concealment being alleged) it was no ground for equitable relief by a contractor against the engineer's decision that the engineer was a stockholder, and so interested in the company.

In *Scott* v. *Corporation of Liverpool*, 3 De Gex & J., 334, [1858,] Lord Chancellor Chelmsford decided that, under an agreement on the part of the covenantor to pay the covenantee, in a certain event, such damages as a third person shall award, there is (in the absence of fraud) no demand at law or in equity, unless that award is made. The case was one of great hardship, but the Lord Chancellor said:

"There is no equitable construction of a contract distinct from its legal construction. To construe is nothing more than to arrive at the meaning of the parties to an agreement, and this must be the aim and end of all courts which are called upon to enforce any rights created and growing out of contracts." (p. 360.)

And, after discussing *Scott* v. *Avery*, he concludes:

"I have entered at so much length into the case partly on account of its great importance, but principally from a desire to show that there may be extracted from previous decisions principles which may be safely applied to determine the effect of the provisions which are now so common in contracts for the execution of works, by which the contractors' claims and liabilities are placed at the discretion and under the control and judgment of the agent of the parties for whom the work is to be done. If the parties to the agreement have provided beforehand for the settlement of any disputes which may arise upon the rights and liabilities growing out of the contract, by the arbitration of persons mentioned in the agreement, or to be appointed when the disputes arise, such a stipulation cannot be urged as an answer to either party who prefers to resort to the courts for the determination of his rights; nor can it deprive the tribunals of the country of their jurisdiction, whatever remedy may be open to the party against whom proceedings are instituted for the breach of agreement. But where the contract provides for the determination of the claims and liabilities themselves of the contractor, by the judgment of some particular person, this would be in-

correctly called a provision for submission to arbitration, as no dispute can exist in such a case, everything being dependent upon the decision of the individual named, and till he has spoken no rights can arise which can be enforced either at law or in equity." (p. 368.)

And upon this principle the English courts will, in the same contract, enforce the agreement for such determination of liabilities and claims by the judgment of a third party, while they set aside the general arbitration clause.

Mills v. *Bailey*, 2 Hurl. & Colt, 36, [1863,] was an action to recover on an agreement for the measurement of mud and the settlement of disputes. The court held, on demurrer, the agreement that the surveyor should fix the quantity of mud to be irrevocable, though his power as arbitrator was revoked.

In *Goodyear* v. *Mayor, &c., of Weymouth*, 1 Harrison & R., 67, [1865,] under a contract for building a market house, the architect's certificate was held final, and his allowance conclusive as to the extra work also.

In *Clark* v. *Watson*, 18 C. B. N. S., 278, [1865,] contractors had agreed to do certain work according to plans, and the defendant agreed to pay for the work in installments on production by the contractors to the defendant of the certificate of the defendant's surveyor "that the contractors had duly and efficiently performed and completed" certain portions of the work to his satisfaction. In his declaration plaintiff averred that he had done everything to entitle him to this certificate, and had completed to the satisfaction of surveyor and of the defendant, but that the surveyor had not given the certificate, but had wrongfully and improperly neglected and refused so to do. But the court unanimously held, on demurrer, that in the absence of collusion the plaintiff was not entitled to recover without producing the surveyor's certificate, and that the defendant was not responsible for the surveyor's refusal to give one.

Chief Justice Ely emphatically remarked: "This is an attempt on the part of the plaintiff to take from the de-

fendants the protection of their surveyor, and to substitute for it the opinion of a jury. That is not the contract which the parties have entered into. The allegations on the part of the plaintiffs were not, in my judgment, such as entitle them to succeed."

In *Roberts* v. *Bury Commissioners*, L. R., 5 C. P., 310, [1870,] the case was decided by a divided court upon a contract, in which the minority of the court say they do not find any intention to bind the contractors to abide by the architect's decision, while the majority find such intention and give it effect. All agreed on the validity of such agreement when made.

In *Jones* v. *St. John's College*, L. R., 6 Q. B., 115, [1870,] the conclusive and exclusive force of such certificates was affirmed.

In *Wadsworth* v. *Smith*, L. R. 6 Q. B. 332, [1871,] such agreements are carefully discriminated from arbitration clauses, and a very broad clause upheld as not being a submission, Blackburn, J., saying: "Where, by an agreement, the right of one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination an award." And the full court concurred in the decision.

And in the last utterance of the English courts on this topic, in *Sharpe* v. *San Paulo Railway Company*, L. R. 8 Ch., 597, 612, [1873,] the Lord Justices James and Mellish strongly affirmed the decision of Lord Romilly, the Master of the Rolls, who applied the doctrine in a railroad construction contract. The contract under seal made the engineer sole judge of contract accounts, and his certificate conclusive between the parties. When the road was done, he gave a final certificate of the balance due the contractor. The Lord Justices unanimously held that, in the absence of fraud on the part of the engineer, and where his certificate has been made a condition precedent to payment, his certificate must be conclusive between the parties and a condition precedent to any action; and they also held that, where the certificate

of the engineer was by the contract made a condition precedent to payment between the parties, the agreement for arbitration did not affect the conclusiveness of the engineer's certificate nor give a court of equity jurisdiction to interfere, although the amount of work might be under stated in the certificate.

These English cases establish a rule of law which is fatal to the contractors' case. There is no allegation in the pleadings, nor any suggestion in the Record, nor a particle of proof that the engineer was not ready, able, and willing to estimate and decide the value of all this work before this suit was brought. Neither is there any pretense that the plaintiffs in error prevented the contractors from performing this stipulation in their contract. And the language of the contracts make the engineer's estimation of the value of work final and conclusive between the parties and a condition precedent to payment by the Company.

In *United States* v. *Robeson*, 9 Peters, 319, 326, this court has held that, where the parties in their contract fix on a certain mode by which the amount to be paid shall be ascertained, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect, and that he must prove his case by the kind of evidence which the contract prescribes, or show that, by time or accident, he is unable to do so.

In that case a quartermaster sought to be allowed for payments made by him upon a charter-party of a steamboat in excess of its face. On the charter-party was indorsed that for all stores carried above a stipulated amount "the same rate shall be paid upon producing duplicate specified certificates of the commanding officer." The quartermaster did not produce such certificates, but offered depositions, to the admission of which in evidence objection was taken. Mr. Justice McLean, in delivering the opinion of the court, uses the following language:

"It does not appear that any excuse was offered why these certificates were not procured, and the question is whether the claimant, at his option, can establish his claim by other evidence. The contract is a law between the parties in this respect, as they expressly agree that the amount of the service shall be established by the certificates of the commanding officer. Can it be established in any other manner without showing the impracticability of obtaining the certificates? Is not this part of the contract as obligatory as any other part of it; and if so, is not the obtaining of the certificate a condition precedent to the payment of the money?

"Where the parties, in their contract, fix on a certain mode by which the amount to be paid shall be ascertained, as in the present case, the party that seeks an enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect. He cannot compel the payment of the amount claimed, unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so. And as this was not done by the defendant in the District Court, no evidence to prove the service other than the certificates should have been admitted by the court."

And because, among other things, the District Court had allowed "other evidence than the certificates of the commanding officer to prove the transportation account," judgment was reversed and cause remanded for further proceedings.

In *Enniss* v. *O'Connor*, 3 Harris & J., 163, plaintiff sued on a contract for building a house in a workmanlike manner, as may be adjudged by a carpenter or joiner thereafter to be appointed. He offered to prove performance by persons not so appointed. The court ruled that the plaintiff was bound to establish his case by the testimony of persons so appoined; and that, as he offered no such evidence, it was irrelevant to go into evidence to show that defendant was prevented from going on with the work by the defendants, or to go in to any evidence of the damage sustained by him.

The question of the ability of these contractors to main-

tain covenant on their contract, without alleging or proving performance of, or any attempt even to perform these conditions precedent, was raised by the demurrer, and again on the motion in arrest of judgment, and is now submitted to this court.

Their ability to hold the verdict which they gained, because the court below permitted them to prove their alleged damage by evidence which the contract was expressly intended to exclude, and did not confine them to that kind of evidence which the parties had agreed should be exclusive, is also submitted, and, in view of the authorities cited, without further argument.

Third. That these contractors cannot maintain an action of covenant on their contract and recover special damages, in addition to contract prices, without alleging and proving performance of their own contract obligations, or a prevention of performance by the company, is unnecessary to argue here.

The declaration, as has already been shown, does not allege performance; nor, in terms, any prevention; but avers insolvency of the company, notice by it to them that it was, and would be, unable to pay its present and future indebtedness, and a failure and refusal to pay, whereby the Company "*rendered any further work by the plaintiffs under said contracts impossible, and so the plaintiffs were in fact thereby absolved from all further attempts to perform the same.*"

The proofs fell far short of these allegations. No such notice was proved. No such insolvency was proved. But a temporary disability to pay in cash, immediately after a great public calamity, an exorbitant demand does appear; and a refusal to pay and secure the whole of that exorbitant demand also appears.

The finding of the jury, under instructions and rulings relative thereto, which are assigned as errors, is, that on

November 28, 1872, (the time when the contractors stopped work,) the company *had* given *the plaintiff to understand that defendant was financially unable to pay the estimates for work then done, and would probably be unable, for a time, to pay future monthly payments.*

No affirmative act of prevention or interference is pretended or suggested. The contractors admit, and the record abounds in proof of the urgent efforts which the company made to induce the contractors to keep on working. The contractors also admit, and the record is full of evidence that the contractors would not go on "*without a new arrangement*," and part payment of and security for $120,000, a sum which incontestibly they had at that time no right to demand.

Do such allegations, in law, describe the *impossibility to perform*, or that *prevention* which alone will excuse non-performance on the part of one who sues upon a contract, and claims every right, every privilege which perfect and faithful performance could give?

Do such facts in evidence justify the rulings of the court and the instruction given to the jury, under which they made their special finding?

In the *Monongahela Navigation Company* v. *Fenton*, 4 Watts & S., 205, although a similar disability to pay, arising out of the failure of the United States Bank, appears, and the company actually *voted to suspend work for the present*, the court say: "This the plaintiffs consider as a rescission of the contracts, a discharge, dismission, prevention, and hindrance from the execution and performance. * * * Nothing is proved which gives countenance to the idea that the contractors were in any way prevented from performance on their part. * * * There was no pretense that the company had not acted in good faith. There was no wantonness in suspending operations. Funds on which they relied with the fullest assurance were found deficient at a critical moment, and a suspension of the work was the only means left them, unless the contractors had been will-

ing to go on with the work and take the risk of consequences."

But in the case at bar the inability to pay was only temporary in fact. It was so believed by the contractors on the very day they stopped work. Notwithstanding the heavy blow which these contractors then struck at the company's life and credit, the company maintained its credit then, and did not fail, and is to-day pressing that work of construction which these contractors abandoned, as the Record shows, in a futile effort to force the company to yield to an extortionate demand. And the Records of this court show that its credit and solvency was sufficient to obtain responsible sureties on the bond in this cause in the sum of $200,000 for the payment of any judgment therein.

These contractors were all citizens of Illinois; and the law of that State on this question is settled by direct adjudications already cited.

Palm and Robertson v. *The Ohio and Miss. R. R. Company*, 18 Illinois, 217, is almost the only case directly in point which has been found after careful search in the books. A contracted to construct and deliver sixteen locomotives to be paid for as delivered. The fifth locomotive delivered was not paid for. The court held, in a suit on the agreement, that the contractors could not, on this account, abandon the contract and recover for loss of profits on the eleven to be delivered, and the materials on hand, unless payment on delivery was expressly made a condition precedent to the completion of the contract. To enable recovery of such damages, the non-performance by the company must be of such a nature as absolutely to prohibit the contractors from fulfilling their contract. Mr. Justice Caton thus delivers the opinion of the court:

The question is, whether the failure to pay for the articles delivered as stipulated was such a breach of the contract as authorized the plaintiffs to abandon it and recover what profits they might have made by completing it. I have examined all the authorities referred to by counsel,

and have made diligent search myself, but have found no case where the plaintiff has been allowed to recover for losses sustained by not being permitted to complete the contract, unless he has been prevented from going on with his work by the positive affirmative act of the other party, or where the other party has neglected to do some act, without which the plaintiff could not, in the nature of things, go on with his contract, as where he refused to furnish a place whereon to erect a building, or to furnish material which, by the contract, was to be put in the works, and which was to be provided by him. In such a case, the act agreed to be done is clearly a condition precedent and indispensable to enable the other party to go on. Where the act which the defendant was bound to do is, by the terms of the contract, made a condition precedent to the performance by the plaintiff, either in the nature of things or evidently in the contemplation of the parties at the time the contract was entered into, then the failure to do the act does of itself prevent the other party from performing, as much as if he were forbidden to perform it. But nowhere have I found a case where the failure to pay the consideration for the work as it progresses, according to the terms of the agreement, has been held such an act or omission on the part of the defendant as to prevent the other party from completing the contract. It is undoubtedly true that the failure to make such payments may in point of fact leave the other party without the means or credit to go on and complete the job, but such is not the necessary result of such a failure, and we cannot safely adopt it as a conclusion of law that it does prevent the party from going on. The prompt payment of such installments might be indispensable to enable a party of some means and credit to go on, while another of larger means and more extended credit might be able to complete the contract without embarrassment or sacrifice. Can we inquire into the actual fact and see whether the non-payment did really stop the plaintiff or not, and thus administer one measure of law to a poor man and another to the rich? A stronger may, in like manner, prevent the party from performing a contract, and even subject him to damages for non-performance by failing to pay him money promptly when due, still he cannot be liable for the damages thus resulting as the consequence of the failure to pay the money. The law has necessarily prescribed different consequences and another and uniform measure of

damages for a failure to pay money when due, and ordinarily it is the same whether it be due in installments as the work progresses, or when the job is completed and the whole is due. The defendant might owe the plaintiff upon another account, to become due at a specified time, upon which the plaintiff relies for the means of completing the contract at the time he enters into it, and a failure to pay such money would be as likely to prevent him from going on with the work as if it were an installment due upon the work itself, and there would be as much propriety, both in reason and in law, to permit him to say that the defendant had thereby prevented him from fulfilling his contract, and call upon him to pay for what profits he would have made had he not been thus prevented from going on with the work. When money becomes due upon the partial completion of a contract, it is difficult to say that it is any more than so much money due the party, and which ought to be paid, to enable him to complete that or some other enterprise, as his interests or inclinations may dictate; and to thus distinguish it from money which may be due him upon any other account. If the money is paid when due, it cannot be distinguished from other money which the contractor may receive from the same or other parties. He may apply it in the further execution of the contract, or to other purposes, as he may choose. The party paying it has no right to insist upon its application or expenditure in any particular way.

A contract, no doubt, may be so drawn as to make the payment of a part of the consideration by installments as the work progresses, or at stated times, independently of the progress of the work, a condition precedent to the further prosecution of the work, and make its non-payment such a substantial violation of the contract as to authorize the other party to abandon the work and sue upon it, as from having been prevented from completing it by the act of the party who had thus failed to perform such condition precedent. But the law cannot infer such a consequence from the ordinary obligation to pay money at a particular time, or upon a completion of a specified part of the work. In order to give a contract such an effect, it should contain some provision showing that it was the intention of the parties that the non-payment of the money as stipulated should produce such a result upon their rights. . . . . Such intention must be found in the expressions used in the contract, and is not to be guessed at as being probable,

from the extent or magnitude of the contract, when there are no expressions in the contract evincing such intention, which would be required to authorize such construction, were the subject-matter of the contract less important, or the amount of the payments withheld more insignificant.

In *The Harriman*, 9 Wall., 161, 167, Mr. Justice Swayne, in delivering the opinion of the court, approves the rule in *Paradine* v. *Jane*, Alleyn, 26, and says:

"The general principle is that, if what is agreed to be done is possible and lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail. * * It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse non-performance. The answer to the objection of hardship in all cases is, that it might have been guarded against by a proper stipulation. It is the province of courts to enforce contracts, not to make or modify them. When there is neither fraud, accident, nor mistake, the exercise of dispensing power is not a judicial function."

In *Smoot's Case*, 15 Wallace, 36, 40, Mr. Justice Miller, in like manner, develops more fully the same doctrine:

"As between individuals the impossibility which releases a man from the obligation to perform his contract must be a real impossibility and not a mere inconvenience. And while such an impossibility may release the party from liability to suit for non-performance, it does not stand for performance, so as to enable the party to sue and recover as if he had performed. * * * * *

"But suppose the contract had been between private parties, and an epidemic had prostrated every horse in the country with disease, for the forty days allowed to buy and deliver sound horses by this contract. Will any one assert that this would authorize the contractor to sue for the profits he could have made if no epidemic had occurred, though he neither then nor afterwards bought, or delivered, or tendered a horse? While such a public misfortune might (we do not say it would) have been a defense to a suit against him for non-performance, it could be the foundation of no claim on his part to recover as if he had performed. * * * * * The question to be considered is not whether the action of the cavalry bureau would have been a defense, if the claimant had been sued for a failure to perform his

part of the contract, but whether it was sufficient to authorize him to abandon the contract himself, and as a plaintiff recover against the other party the profits which he would have made if it had been fairly performed."

He then cites from Benjamin on Sales :

"A mere assertion that the party will be unable or will refuse to perform his contract is not sufficient. It must be a distinct and unequivocal absolute refusal to perform the promise, and must be treated and acted upon as such by the party to whom the promise was made ; for, if he afterwards continue to urge or demand compliance with the contract, it is plain that he does not understand it to be at an end."

In *Mill Dam Foundry* v. *Hovey*, 21 Pick., 417, Chief Justice Shaw held temporary delay in furnishing materials not to amount to prevention. "It must be an express refusal, or such neglect for so long a time after reasonable requisition, as to manifest an intention on their part not to furnish the necessary materials, and to prevent him from finishing his contract. . . . . The refusal to advance money, not being the breach of a condition precedent, would not excuse the defendant from performing the contract on his part."

In all the cases cited by the learned counsel for the defendants in error, in support of their position that mere inability to pay is prevention, there was some other element in the acts which were held to amount to prevention, which showed *intention to stop the party* in his undertaking.

Fourth. As to the remaining points, it is urged that the plaintiff contractors, being bound to show positive performance of their own agreements before they are entitled to be heard in this case, cannot uphold an original, aggressive claim on such weak foundations of "waiver" and "estoppel." They are not defending themselves against a claim for damages, but seeking to obtain them. They put in issue the solvency of the company as part of their own case, and it would be very unjust not to allow the Company to disprose a fact which is important to determine that issue. The

question was not "whether they paid or not," but whether, by their inability to pay, they *prevented* the contractors from working. The fact and duration of that inability became important in order to establish or disprove the plaintiffs' great assumption.

In like manner, the efforts which the company made to preserve their rights from being impaired by paying the October installment, are certainly one element in the question of waiver, and the intent and understanding of the parties. A similar protest is sufficient to save to importers their rights to sue for overcharge in duties; and here the question is of *intent*, which is always of the essence of waiver.

EDWIN H. ABBOT,
Of Counsel.

Supreme Court of the U. S.

OCTOBER TERM, A. D. 1874.

PHILLIPS & COLBY CONSTRUCTION COMPANY,
Plaintiff in Error,
vs.
MARK T. SEYMOUR, ET AL,
Defendants in Error.

No. 255.

Brief for Defendants in Error,

BY

SLEEPER & WHITON.

STILLMAN & BENEDICT, Printers, 166 Washington St., Chicago.

Supreme Court of the U. S.

OCTOBER TERM, A. D. 1874.

PHILLIPS & COLBY CONSTRUCTION COMPANY,
Plaintiff in Error,
vs.
MARK T. SEYMOUR, ET AL,
Defendants in Error.
No. 255.

BRIEF FOR DEFENDANTS IN ERROR.

As no assignment of errors appears in the transcript in this cause, and as we are also obliged to prepare our argument without knowing what errors may be assigned in the brief for the plaintiff in error, or how fair and full a statement of the facts in the case may be given in such brief, we may fail to give due prominence in our discussion, to the several questions which we suppose will be argued by opposing counsel, and may also unnecessarily restate some of the facts which appeared on the trial below, and questions of law that arose on such trial.

The leading facts in this cause, and the questions which arise thereon, are as follows:

The Wisconsin Central Railroad Company had projected a line of railway extending from Stevens' Point in Wisconsin about 200 miles northwesterly, to Lake Superior, at or near Bayfield.

Inside the Rail Road Company, in the fashion so common of late years, a Construction Company—the plaintiff in error—had been formed, which had contracted on some terms not disclosed on the trial, to build the whole line for the Railroad Company, and was endeavoring to perform its contract by subletting the work in sections to other parties.

Work by sub-contractors was progressing simultaneously on both ends of the line, the northerly 40 miles having been sublet to parties not concerned in this litigation.

The southerly 160 miles had been sublet as follows: On September 7, 1871, the Construction Co. made a contract with Hopper, Boyle & Seymour for constructing the southerly 40 miles substantially ready for track-laying. (See this contract, transcript pages 6–17.) As the work provided to be done in this contract was duly finished and paid for, no particular examination of its terms will be necessary.

On January 25, 1872, the Construction Co. entered into a further contract with Hopper, Boyle & Co., for building the remaining 120 miles necessary to make connection with the Lake Superior division. (See this contract, transcript pages 18–29.

The parties who had undertaken these two contracts for the southerly 160 miles of the line, had become embarassed, and the result was that on July 18th, 1872, a new contract was made by the Construction Co. with M. T. Seymour & Co., the defendants in error, who with the consent of the former contractors, took upon themselves the performance of the contracts of September 7, 1871, and January 25, 1872, with certain modifications. This new contract, for the breach of which this action is brought, appears at pages 3–6 of transcript.

The evidence tended strongly to show that the scutherly 60 miles embraced in the two contracts assumed by M. T. Seymour & Co., was the most difficult and unprofitable part of the work, that they did not at the stipulated prices expect to make any money out of that part of the line, but relied for profit on the northerly 100 miles covered by their contracts. When M. T. Seymour & Co. entered into the contract of July 18, 1872, their predecessors had completed 18 or 19 miles out from Stevens' Point, on which the iron had been laid.

Owing to the unusually wet weather, and the prostration of Seymour by paralysis, the completion of the first 40 mile division was delayed a little beyond contract time, a circumstance that did no harm to any one except M. T. Seymour & Co., who were keeping in the field a force of from 500 to 600 men, but on Sept. 7, a final certificate of the satisfactory completion of this 40 miles was given by the chief engineer, and that portion of the work duly paid for, except the reserves thereon retained by the Company as security for the completion of the next division of 120 miles, as stipulated in the contract of July 18, 1872.

Among the provisions in the contract of January 25th, 1872, relating to this 120 miles, were the following:

"Said second party agrees to conform in all respects to the directions and instructions of said chief or assistant engineers, or parties of the first part relative to the work, and shall progress with the same *at such time or times, in such manner, and at such particular points* on the line of such work as said chief or assistant engineer shall direct.

"It is further mutually agreed, that if said second party shall, in the opinion of the first party, have failed or refused to comply with any of the stipulations, to be performed, by said second party,

the said first party shall have a right to cancel this contract, and declare the same void, *in which event*, said second party shall have no claim whatever, on said first party, for damages, compensation or percentage retained, either for material or work—also if the said second party, shall at any time, neglect or refuse, to progress with the work, as fast as in the opinion of the engineer, or party of the first part, may be necessary, for the completion by the time specified herein, then said first party may declare this contract abandoned, and the amount which shall have been retained, at the time, out of the monthly estimates, shall be forfeited to said first party, *or* said first party may at their option, employ other parties to execute any part of the work, and charge the cost of the same to said second party. It is mutually agreed, that whenever in the opinion of the said first party, it may be necessary to stop any or all of the work, or to diminish the force employed, said first party shall have the right to do so, and the said party of the second part shall have no claim for damages, but shall immediately stop the work, or diminish the force, as the first party may direct." (transcript, p. 19.)

After providing that the work should be paid for, in monthly estimates, on the 15th day of each month, as the work progressed, 15 per cent, being retained as a reserve security, there was this further clause: "It is further agreed, that whenever, and as fast as 20 consecutive sections (1 mile each,) of the work are finished, as herein agreed *full payment shall be made for the same*, in the manner hereinbefore provided. It is further agreed, that this contract may be terminated, by said first party, *upon giving* 30 *days notice of such intention, and in such case the hay, grain and provisions of said second party, on the work at the time of giving such notice, shall be taken at cost by the said first party.*" (transcript, p. 22.)

Among the provisions contained in the contract of July 18, 1872, were the following:

After providing that a *bonus* of $15000, should be paid on the completion of the first 60 miles, it stipulated, " that the sum of $15000, to be paid on the completion of the first 60 miles, as herein provided, is to be held by the said first party together with the 15 per cent reserve on, and as security for the completion of the third 20 mile section, and that the 15 per cent reserve, on all the work beyond the first 40 miles, is to be left in the hands of the first party, and held by it as additional security, for the performance of the contract, and to be forfeited to it, and applied towards the payment of any claim for damages, for failure of the second party, to have the work of construction completed, in the time above specified; that the said second party, shall at all times, keep and maintain on the said work, at the proper points, a force of men and teams efficiently equipped, and properly cared for, sufficient in the opinion of the engineer to complete the work, on the said several sections, within the time limited therefor, and *in default thereof the said engineer may, from time to time, make his requisitions*, in writing on the second party to increase its force of men and teams, or both, *and in case of failure to comply with any such requisitions, in whole, or in part, within* 10 *days thereafter, the said first party shall be, and hereby are authorized, and at the proper cost and charge of said second party, to supply any such deficiency in men or teams.* That said first party shall have the rights to change the quantities of work, on the whole line, or any part thereof, increasing or diminishing the same at pleasure &c." (see transcript. p. 5.)

M. T. Seymour & Co. had subcontracted the northerly 100 miles of the 120 embraced in the contract of January 25, 1872, so that the whole work covered by that contract was being pushed

to completion with a force of 800 to 1000 men, and the usual complement of teams and tools, when the work was abruptly terminated by the practical insolvency of the Construction Co. (Transcript p. 55.)

It may not be improper to state in this connection, though it does not distinctly appear from the transcript, that all the evidence produced on the trial by the defendants in error to sustain their claim in the declaration of special damage by reason of loss of profits on the uncompleted work embraced in their contract was stricken out and withheld from the jury on the motion of the counsel for the Construction Co. on the ground that such damage was too speculative and remote, although it appeared that M. T. Seymour & Co. had actually sublet 100 miles of the road with the approval of the Construction Co. at a large profit to themselves.

From the whole evidence it clearly appears that although the work on the whole 120 miles covered by the contract of January 25, 1872, was not being completed quite as fast as was contemplated in the contract of July 18, 1872, yet that it was progressing satisfactorily to the Construction Co., and as rapidly as was required for track-laying with the iron at the company's command, when suddenly about the first days of December, 1872, it was discovered that the Construction Co. had become so financially embarrassed as to be unable to pay the large amount then due M. T. Seymour & Co., or provide any means for paying for further work; and there was no recourse for the defendants in error but to instantly stop further outlays on the work and save what they could from the wreck of their undertaking. (Transcript, pp. 55, 59, 66.)

When the work stopped, an additional 30 days of labor with

the force employed, would have ensured the completion of the first 60 miles out from Steven's Point. (Transcript p. 61.)

At the time of the breakdown and stoppage of work, the Construction Co. was indebted to the defendants in error as follows:

For Octob'r estimate, add'g int. to trial,	$44,331.62	
For Novemb'r " "	24,297.83	
For Decemb'r " "	10,276.36	
		$ 7
Bonus on the first 40 miles of work.....		1
Retained percentage on work done.....		1
Ties delivered but not included in estimates.....		
Amount actually earned and unpaid.....		$1

But the defendants in error proved the following items of special damage directly resulting from the breaking up of their contract, viz:

Cost of a supply road from Sec. 53 to Sec. ~~56~~ 74, of no value except to the Construction Co. if work was resumed.....	$
Value of provisions, groceries, &c., consumed and lost on stoppage of work.....	
Value of goods carried off by Construction Co. to Stevens' Point, and lost	7,548.88
Depreciation and loss on disposal of horses, mules, oxen, harness and wagons.....	3,252.00
Value of log houses, lumber, &c left on unfinished work.....	1,603.88
Loss on lumber used for shanties, &c.....	755.00
Expenses of agent Voak in collecting and saving part of the plant.....	288.86

to completion with a force of 800 to 1000 men, and the usual complement of teams and tools, when the work was abruptly terminated by the practical insolvency of the Construction Co. (Transcript p. 55.)

It may not be improper to state in this connection, though it does not distinctly appear from the transcript, that all the evidence produced on the trial by the defendants in error to sustain their claim in the declaration of special damage by reason of loss of profits on the uncompleted work embraced in their contract was stricken out and withheld from the jury on the motion of the counsel for the Construction Co. on the ground that such damage was too speculative and remote, although it appeared that M. T. Seymour & Co. had actually sublet 100 miles of the road with the approval of the Construction Co. at a large profit to themselves.

From the whole evidence it clearly appears that although the work on the whole 120 miles covered by the contract of January 25, 1872, was not being completed quite as fast as was contemplated in the contract of July 18, 1872, yet that it was progressing satisfactorily to the Construction Co., and as rapidly as was required for track-laying with the iron at the company's command, when suddenly about the first days of December, 1872, it was discovered that the Construction Co. had become so financially embarrassed as to be unable to pay the large amount then due M. T. Seymour & Co., or provide any means for paying for further work; and there was no recourse for the defendants in error but to instantly stop further outlays on the work and save what they could from the wreck of their undertaking. (Transcript, pp. 55, 59, 66.)

When the work stopped, an additional 30 days of labor with

the force employed, would have ensured the completion of the first 60 miles out from Steven's Point. (Transcript p. 61.)

At the time of the breakdown and stoppage of work, the Construction Co. was indebted to the defendants in error as follows:

For Octob'r estimate, add'g int. to trial,	$44,331.62	
For Novemb'r " "	24,297.83	
For Decemb'r " "	10,276.36	
		$ 78,905.81
Bonus on the first 40 miles of work		15,000.00
Retained percentage on work done		19,937.16
Ties delivered but not included in estimates		2,167.25
Amount actually earned and unpaid		$116,010.22

But the defendants in error proved the following items of special damage directly resulting from the breaking up of their contract, viz:

Cost of a supply road from Sec. 53 to Sec. ~~56~~ 74, of no value except to the Construction Co. if work was resumed	$ 4,087.35
Value of provisions, groceries, &c., consumed and lost on stoppage of work	2,016.50
Value of goods carried off by Construction Co. to Stevens' Point, and lost	7,548.88
Depreciation and loss on disposal of horses, mules, oxen, harness and wagons	3,252.00
Value of log houses, lumber, &c left on unfinished work	1,603.88
Loss on lumber used for shanties, &c	755.00
Expenses of agent Voak in collecting and saving part of the plant	288.86

Various items of extras, (deducting ties) specified at p. 63 of transcript	1,200.44
Telegraph poles	140.00
70 barrels of cement	267.50
	$137,170.63
To this there should be added some reasonable compensation to the defendants in error for their loss of time, and derangement of business growing out of the breaking up of so large an undertaking, say	5,000.00
Total amount due M. T. Seymour & Co	$142,170.63

But the Construction Co., in spite of our protests, and as we claim without any shadow of authority, paid considerable sums to our men, and in some cases more than was due them on a proper settlement with us, thus depriving us of the only chance for collecting our cross-demands from irresponsible men. Allowing all these payments, as the jury did, they were as follows:

Amt. paid our laborers including board bills	$26,869.00	
Amt. paid on bridge contract	4,990.60	
		31,859.60
Balance our due		$110,311.03
But the verdict for this demand was only		107,353.44
General verdict too small by		$2,957.59

In addition was the special verdict for extra cost of work done by train, amounting to $11,708.00. There was no conflict, as to the fact that this was the actual cost of so doing this work, and the question as to who should bear this extra cost, depended on the testimony of Alexander, Wellman and Phillips. (transcript, pp. 62, 67, 68, 69.) The question was one wholly of fact, was fairly submitted by the court to the jury, and we think the evidence plainly sustains the special verdict.

II.

The action was brought upon the sealed contract of July 18, 1872. That contract consisted of a series of independent and divisible covenants, and was ambulatory to the extent that the Construction Company, might at discretion, change the amount, character and location of the work on the whole 160 miles, or at discretion, enlarge the working force at the expense of M. T. Seymour & Co., or stop work altogether on 30 days notice.

As *time* was not declared to be *material*, *these* features of the contract, seemed to make it clear that the Construction Company, did not regard it of importance, that the different sections of the work, should be completed at the precise times mentioned, in the contract, a conclusion that is further fortfiied, by the fact that no evidence was offered to show that the Construction Company was itself under any obligation to the Railroad Co., to have any portion of the work done at any specified time. But whether this view of the contract is sound or not, the evidence was satisfactory, that the Construction Co., had waived and

excused the non-completion of the work actually done, at the precise time fixed in the contract.

When the Construction Co., became embarrassed, and unable to pay or sccure payment for what it already owed M. T. Seymour & Co., or give any hope of compensation for future work, they treated the contracts as abandoned by the Construction Co., and at an end by reason of its default, and after making the best disposition they could of the large plant, they had collected for prosecuting the work, and after various unsuccessful attempts at a settlement, they brought this suit for what was due them on the contract, and the direct and immediate special damage they had suflered by reason of its breach.

III.

The theory of the defense below seemed to be that the *time* within which each 20-mile section was to be completed, was of the *very essence of the contract*, and that inasmuch as the evidence showed that the 3d 20-mile section was not completed on Sept. 15, 1872, there could be no recovery on the contract of July 18, 1872; that evidence of a *waiver* of performance within the stipulated time was immaterial, as it would only tend to show that a new verbal contract had been substituted, upon which only an action of assumpsit would lie, and in which a recovery must be limited to a *quantum meruit and quantum valebant*, and in which no items of special damage as alleged in the declaration could be shown.

It was also claimed by the counsel of the Construction Co. that the facts in evidence did not justify M. T. Seymour & Co. in abandoning the work and suing for a breach of the sealed

contract, because the *mere inability* of the Construction Co. to pay for the work done, was not a *prevention* by the Construction Co. of the completion of the work, that M. T. Seymour & Co. were, notwithstanding the default of the Construction Co., bound to go on and complete the whole line strictly in accordance with the contract, if they intended to hold the Construction Co. liable upon the sealed agreement; otherwise if they saw fit to quit the work before final completion, by reason of the mere neglect or refusal of the Construction Co. to pay what was due from time to time they could only sue in assumpsit for the value of labor and materials actually expended and placed on the line.

It was further claimed that the contracts gave the Construction Co. the right to stop at any time, and that in this case it *only stopped work*, and therefore could only be liable for the estimated value of the work done, and not for that, until a final estimate was presented to it from the chief engineer.

IV.

After this general survey of the facts, and the theories of law upon which this action was prosecuted and defended, we are next to enquire into the legal soundness of our claims to recover upon the written and sealed contract of July 18, 1872.

1. Was the contract of July 18, 1872, *entire* or *divisible?*

This Court declared in *Perkins vs. Hart*, 11 Wheat., 251: "When any agreement embraces a number of distinct subjects which admit of being separately executed and closed, it must be taken distributively," &c. And see *Goldsboro vs. Orr*, 8 Wheat. 217.

In the notes to *Cutter vs. Powell*, 2 Smith's L. C., 17, 24, will be found a full discussion and citation of authorities on the point suggested.

The five rules of Sergeant Williams there referred to, and which provide a test for every conceivable question as to the entirety or divisibility of the covenants in a contract, will furnish us a certain answer as to whether the contract in question was entire or divisible.

An inspection of its terms will show that the work was to be done in sections, *and paid for as the sections were completed*, a certain percentage only, being retained to secure final completion. The contract was therefore plainly a divisible one. and suits for the instalments would have lain on the written contract as they successively fell due.

A failure to note the distinction between entire and divisible contracts, led counsel for the Construction Co. on the trial below to cite such cases as *Dermott vs. Jones*, 23 How. 220, & 2 Wall, 1, and *Slater vs. Emerson*, 19 How. 224, which turn upon the fact that the contracts in those cases were *entire*.

In the case of *Slater vs. Emerson*, this court said: "On a contract where time does not constitute its essence, there can be no recovery at law on the agreement where the performance was not within the time limited. A subsequent performance and acceptance by the defendant will authorize a recovery on a *quantum meruit*."

This language, which was entirely applicable to the particular case then under consideration, is perhaps liable to misconstruction. That was a case of a *single and entire contract* by which Slater agreed to give Emerson certain notes *on condition* that Emerson should complete certain work *by the 1st day of De-*

cember, A. D. 1854. Emerson did not complete it till a later period, and this Court rightly held no recovery could be had on the special contract for a refusal to deliver the notes. As in that case the mutual promises went *to the whole consideration on both sides*, they were mutual conditions, and the party bringing suit was bound to aver and prove performance on his part as laid down by Serjeant Williams in his 4th rule, 2 Smith's L. C. 27.

An attentive examination of the case, however, will illustrate aud fortify the positions we have taken. The court in its decision after alluding to the necessity of looking into the surroundings at the time of the making of a contract to ascertain the intention of the parties, held that time was in that case an essential part of the contract, because the *continuous line to N. Y.*, was the strong motive to Slater, and that continuous line could only be secured by the completion of Emerson's work by the 1st day of Dec. 1854.

The Court added that it was difficult to perceive any satisfactory mode of recouping damages in favor of Slater for a failure to complete the work at the specified time, because his damage as a mere stock or bondholder was remote and contingent, and could only be ascertained by finding the general damages to the Railroad Co., and then distributing the amount in proportion to the interests of the members, a proceeding suited only to a court of cquity.

The contract also was a mere volunteer contract of Slater, independent of the Company of which he was President, and the sum which Slater agreed to pay was not in addition to what Emerson was to have under his previous contract, with the R. R. Co., but to be credited as a payment on that contract, so that the substance of the arrangement was, that Slater agreed per-

sonally *to be a surety for the Company* to the amount of the notes, provided Emerson finished the work by the 1st day of December, and a surety, can of course, only be held by proving a strict performance, of the contract, upon which he proposed to become liable.

The remarks we have made on this case, apply to the case of *Dermott vs. Jones*, 2 *Wall.* 1, and all similar cases where one entire job is to be performed, by a certain time, or in a certain manner, before the time of payment arrives.

But the contract in the case at bar, was of an entirely different character from those in the cases just referred to, and falls within the 3d rule of Sergeant Williams that "when a promise goes only *to a part* of the consideration and a breach thereof, *may be paid in damages*, it is an independent promise, and an action may be maintained for the breach of it, without averring performance or readiness in the declaration." 2 *Smith L. C.* 26.

Here was an extensive contract, containing a great variety of subjects and stipulations respecting the same, and the question is whether looking at the whole scope of the contracts, and all the surroundings, the parties intended to make the completion of the several sections, on the road, *at the exact times* mentioned in the contract, a *condition precedent*, to a right to recover on the contract for work under it.

We cannot answer this question better than in the language of this court, upon a precisely similar question, in *R. R. Co. vs. Howard*, 13 *How.* 338: "We find no such agreement. On the contrary the covenant to pay for what shall have been done, during each preceding month, is absolute and unlimited, and the parties have provided a mode of securing the performance, of the work, and indemnification of the Company from loss

wholly different from making these covenants in any particular, dependent on each other. They have agreed that the Company may declare a forfeiture of the contracts, in case the work shall not proceed, to their satisfaction, and may retain 15 per cent of each payment, to secure themselves from loss. We hold it was not the intention to make the payment of any installment, dependent on the covenant to finish the work, by the first day of November."

For the precisely similar provisions here commented on, and looking to the same ends, see the extracts we have already given from the contracts, in the case at bar.

We concede that the decisions in England and the various States are not harmonious upon the question, as to whether in the case of an *entire contract*, a party who has not fully and literally performed shall have his action on the special contract, or be remitted to an *indebitatus*, or be deprived of all remedy.

Hayward vs. Leonard, 7 *Pick*, 181.
Smith vs. Brady, 17 *N. Y.* 173.

And see notes to *Cutter vs. Powell*, 2 *Smith L. C* 17.
2 *Parsons' Con'ts*, 517 *to* 524, 5th *Ed.*

But in the case of a *divisible* contract, like the one at bar, where the work is divided into sections to be paid for on estimates, as fast as severally completed, there can be no doubt that a suit is maintainable on the special contract, on the completion of each distinct section, and if during the progress of work on any section, the contractor is compelled to abandon it, by the wilful misconduct, or unexpected insolvency of his employers, he may still recover on the special contract, what is due for work done, and damages directly resulting from the breach,

such was the rule held in the following cases, *where the action* was *covenant*.

Myers vs. R. R. Co., 2 Curtis, C. C. 28, 34.
R. R. Co., vs. Story, 6 Barb,, 419.
Mc Lure vs. Dana, 9 Dana, 64.
Danville Bridge Co. vs. Pomeroy, 15 Pa. St. 151.
McComb vs. Mc Kenna, 2 Watts. & S. 216.
Ives vs. Van Epps, 22 Wend. 155.
Rodman vs. Hazelhurst, 9 Gill. 294.
Cort vs. Ambergate R. R. Co., 79 E. C. L: 126.
Masterton vs. Mayor, 7 Hill, 61.

But the point will be made, that we were not *prevented* from fully performing our contract, by the Construction Co., and that voluntarily abandoning it on account of the mere refusal, and inability of the Construction Co., to pay us, deprived us of the right to sue on the special contract, and that our remedy, if any, is an action of assumpsit for our labor and materials.

An examination of the nine cases last cited, will show that the *prevention* complained of, and which was held sufficient to sustain covenant, was the *mere inability* of the employer to pay according to the contract.

See also 1 *Redfield Railways*, 412, and *prevention* is equivalent to *performance* in sustaining an action, on a special contract, 2 *Smiths* L. C. 53, 7th Ed.

The distinction between an action on a special contract which one party has been prevented from completing by the fault of the other, and an action of assumpsit proceeding for damages on the ground that a special contract has been rescinded, is well stated as follows: "When the contract is terminated by one

party against the consent of the other, the latter will not be confined to the contract price, but may bring his action for a breach of the contract, and recover as damages all that he may lose by way of profits in not being allowed to fulfill the contract, or he may waive the contract and bring his action on the common counts for work and labor generally, and recover what the work done is actually worth. But in the latter case he will not be allowed to recover as damages anything for speculative profits, but the actual value of the work and materials must be the rule of damages. If the party seeks to recover more than the actual worth of his work in a case where he has been prevented from performing the entire contract, *he must resort to his action directly upon the contract*, but when he elects to consider the contract rescinded, and goes upon the *quantum meruit*, the actual value is the rule of damages."

Clark vs. The Mayor &c., 4 *N. Y.*, 343.
See also 2 Smith's L. C., 29.
Dubois vs. Canal Co., 4 Wend., 285.

But it has been held in some cases that a party to a sealed contract, who has been prevented from fully completing it, *was bound* to sue on that contract, and could not maintain *indebitatus* assumpsit.

Young vs. Preston, 4 Cranch. 239, 2 Smith L. C. 30.

To make a distinction in the character of the action and in the rule of damage between the case of a stoppage by physical violence on the part of an employer, and one resulting from his inability or refusal to pay according to his agreement, seems unfounded in principle, though it has been attempted in some decisions.

Thus in a late case in the Sup. Ct. of Mo., *Fitzgerald vs. Hayward*, 12 Am. Law Reg., 771, the court held that for the non-

payment of money due on his contract, the contractor may abandon his work and sue on the special contract for what is due him, and his direct damages, but that in such action he could not recover *alleged profits on unperformed work*, as he might have if he had been stopped by the *unauthorized interference* of the employer.

A similar doctrine was held in *Palmer vs. Robertson*, 18 Ill., 217, and *County vs. Overholt*, 18 Ill., 223. Just what degree of turpitude in the conduct of the employer would make him liable for profits on unperformed work, these decisions leave us in doubt, but we are confident that such distinctions have been generally ignored in the courts of this country and England.

R. R. Co. vs. Howard, 13 How., 307.
Cort vs. R. R. Co., 79 E. C. L., 126.
Sedg. Meas. Dams., 74.

But for the purposes of this case, the question is rather speculative than practical, for we are not seeking to sustain *a recovery for profits on unperformed work*, all our evidence on that branch of our case having been ruled out, as already stated, on the trial below.

The Supreme Court of Illinois, had occasion later to look into a similar question, in *R. R. Co. vs Spurck*, 24 Ill., 588, where they say "the right of recovery depends upon whether the appellants have violated their part of the agreement. If they have performed, then the appellees have no right to abandon the contract, and sue for the price of the labor performed under it. But if on the contrary, *the appellants have failed to make payments*, as stipulated in the contract, or if they discharged appellees, and without sufficient cause prevented them from

completing their contract, *they had the right to abandon it, and recover damages, for its breach.* There is no evidence that the appellents *discharged* the appellees, but it is contended that the evidence shows *a failure to pay the amount due upon the contract.*"

The court then hold that proof of such a breach, by mere non-payment, would sustain an action on the contract, and a recovery for what was actually due, including actual damages resulting from such breach, and this is all we claim in this case.

To the same effect are

Chamber of Commerce vs. Sollitt, 43 Il., 519
Swartz vs. Saunders, 46 do 78.

An allegation of *performance* of a condition in a contract, is satisfied by proof of its *waiver* by the party in whose favor it is made.

McComb vs. McKenna, 2 Watts & S. 216.
Merrill vs. R. R. Co., 16 Wend., 586.
Fleming vs. Gilbert, 3 Johns, 528.
Bacon vs. Cobb, 45 Ills., 56.
1 Redf. on Railways, 408 n,

And the same principle is constantly applied in insurance cases where an averment of the service of proofs of loss is sustained by evidence of the waiver of such proofs.

In all cases where it is not apparent that the parties have substituted a new verbal agreement for the previous written contract, the tendency of the later decisions, as appears from the cases cited, is to allow a recovery on the written contract, when any right of action at all exists, if the defendant can be sufficiently indemnified for defective performance by a cross action or recouping from the plaintiff's demand.

Almost every objection that can be raised to the theory upon which this action was brought, was raised and decided in our favor in the case already referred to of *R. R. Co. vs. Howard*, 13 How., 307, a case we believe more nearly parallel to the case at bar, than any other to be found in the books.

It was objected in that case, as in this, that *covenant* would not lie, and that Howard should be turned round to an action of *assumpsit*, because he had not performed his work, at the stipulated times, was claiming for extra work, and had never completed his contract, having been prevented by the act of the R. R. Co.

But this court held that covenant was the proper action, and that in it a recovery might be sustained for all the defendant owed on the contract, including full damages for its breach.

V.

If we have succeeded in satisfying the court that an action on the *special contract*, was sustainable, in this cause, for its breach, and that in such an action, we were entitled to recover not only what was due us for work done, but also damages directly resulting from our being compelled to abandon the prosecution of the work, by the fault of the Construction Co.; then we are next to enquire whether the plaintiff in error, could possibly have been prejudiced, by any of the rulings, or instructions of the court, to which exception was taken on the trial below.

The first point referred to in the bill of exceptions, (transcript p. 52) is that [redacted] the two contracts of Sept. 7, 1871, and Jan.

25, 1872, are *unsealed* instruments and were therefore inadmissible in evidence in this action of covenant.

Had the action been founded on those contracts the objection would have force, but an inspection of the declaration will show that the action was based upon the *sealed contract of July* 18, 1872, in which latter contract the two former parol contracts were referred to, and with some modifications incorporated into the sealed contract, so that there was no way of showing what the sealed contract really was, without averring and proving the contents of the prior parol contracts.

A bare statement of the point made seems to be sufficient to show that it is untenable.

The next point which the bill of exceptions suggests is that there was no right of recovery because the engineer in charge had not given *final estimates* for the work above section 40, and because in fact no work above Sec. 40 had been *fully completed.*

Had we alleged a *complete performance* of our contract by us, and were we suing for the *full contract price* of our work *after such comptetion*, then had the Construction Co. refused to accept our work, the point made would have weight; although if the company had taken into their own use and possession the uncompleted work, then such facts, if proved would be sufficient to entitle the company to recoup its damages but would not bar the action.

But the theory of this action is altogether different. We do not claim a full performance of our contract, nor are we suing for the full contract price of a completed undertaking.

We allege that while pursuing our work under the contract

in a proper manner, we were compelled to abandon it by the acknowledged inability of the Construction Co. to pay the large amounts already due on the contract, or to provide any means to pay for further work, (transcript p. 31) and surely it was not necessary to our right of action to proceed with our work to the end, and ruin ourselves for an insolvent corporation, which was all the time admitting it could not pay, and had no prospect of being able to pay for such work.

Cort vs. R. R. Co., 79 E. C. L., 126.

A question on the trial was as to whether the Construction Co. had waived or excused the failure of the defendants in error to complete some portions of their work as was provided for in the written contract.

As bearing upon this point, the witness Alexander, testified (transcript, p. 55,) to the receipt of certain letters written to him, by the engineer, in charge of the work and apparrently complaining that the defendants in error were not prosecuting their work, with a sufficient force, and the witness was allowed to state that the language of such letters was in a measure dictated by himself, upon a conference with the engineer; the object being to show the letters to some sub-contractors, under M. T. Seymour & Co., who were not pushing their work as fast as Alexander desired.

The engineer corroborated Alexander on this point, (transcript p. 61.)

The counsel of the Construction Co. objected to such statements on the ground, that the letters should be *produced* that they might speak for themselves, but the point was not as to the terms, in which the letters were couched, but simply why such letters were written, besides the objection was removed, if it had been

valid, by the subsequent production of the letters. (transcript, p. 57.)

Upon the main question, as to whether the Construction Co., had not waived a literal compliance with the terms of the contract, as to the rate of the progress of the work, the evidence is certainly sufficient to sustain the verdict of the jury, indeed cannot even be said to be contradicted, by any evidence offered on the part of the Construction Co.

Kimbro vs. Bullitt, 22 How., 256.

No damage was proved to have been suffered by reason of the delay, no detention of track laying, bridge building, or other impediment, to the prosecution of other portions of the work was suffered, the Construction Co. did not avail itself of the right in case the work was not progressing with sufficient rapidity, to put on a larger force, at our expense, and the result showed that the defendants in error, were actually finishing the work faster than the Construction Co. had means to pay, as it progressed.

The next objection which appears from the bill of exceptions, (transcript, pp. 56, 60,) to have been taken by the Construction Co. to the admission of testimony, was that offered as to certain items of special damage, set up in the declaration; as the cost of transporting men to work on the line, supplying tents, buildings &c., for their accommodation, cost of constructing a supply road, by which provisions and materials, for the construction of the line, could be hauled in to the line, value of plant prepared to prosecute the work, and of a certain lot of ties which had not entered into the estimates, but which had been received by the Construction Co., from the defendants in error.

The Court received this evidence, subject to being rejected in the charge to the jury, if upon the whole case it was found immaterial or irrelevant, and in the subsequent charge to the jury, a portion of such evidence was excluded, and the extent to which the remainder was relevant, and material was carefully explained to the jury (transcript, p. 76,) so that we cannot see any foundation, for an argument that the Construction Co., was prejudiced, by the admission of such evidence. The charge of the court carefully excluded from the jury the consideration of any damages, not the direct and immediate conseqnenct of the breaking up of the enterprise, by the pecuniary embarassments of the Construction Co., and all claims to speculative profits and advantages, whether made by one party, or the other, were rigidly excluded; thus adopting a rule of damages, recently approved by this court, where a similar question arose.

Bulkley vs. U. S. 19 Wall., 36.

The next ruling, to which by the bill of exceptions, (transcript, p. 61,) it appears the Construction Co. excepted to, was the admission of testimony, as to the *weather* during the progress of the work.

It was not claimed, by us, that bad weather would alone be any excuse for the non-performance of an explicit contract, but as bearing on the good faith of the defendants in error, and making reasonable and probable their testimony, that the Construction Co., was satisfied with the rate of progress made under the adverse circumstances, and had therefore excused a strict compliance, with the letter of the contract, as to the *time* within which the different sections of the work should be completed, the testimony was admissible, though not very important, and certainly its admission could not have done the Construction Co. any harm, for unless the jury had found a waiver from other

testimony, the condition of the weather would have been of no consequence, and could not alone have influenced the jury, under the instructions of the court, as to what would constitute a waiver. (transcript, p. 73.)

Coffee vs. Planters' Bank, 13 How., 183.
Ventrass vs. Smith, 10 Peters, 161.

Objection was also made to the testimony, as to cost o collecting, preserving and finally disposing of the plant, after the suspension of the work, (transcript, p. 61). Such testimony certainly had a tendency to prove the direct loss the defendants in error suffered from the breaking up of their enterprise, and under the instructions of the court, could not have prejudiced the Construction Co.

It appeared on the trial that at certain points, in the 20 miles from section 40 to section 60, the ground was low and wet requiring expensive corduroying to support teams, and making progress necessarily slow.

It appeared that Alexander, representing the defendants in error, and Phillips representing the Construction Co. had a conference as to a plan for constructing the road over such places, by the use of *a locomotive and train*, which would be more expensive for the defendants in error, than the mode provided in the contract, would prevent their making a profit on the corduroy, but would expedite the completion of this part of the work. The extra cost of the work beyond what it would have been, if done in the manner provided in the contract, was $11.708. This we believe is not disputed, but it was claimed by the Construction Co., that it was not bound to pay the extra cost, while on the other hand the defendants in error insisted that Phillips, the President of the Company, agreed to pay it. The evidence, bearing on the question, consists in the testimony of Alexander,

Phillips and Wellman the chief engineer. (transcript, pp. 62, 68, 69.) Wellman certainly corroborates Alexander, and the question was submitted to the jury, under a fair charge from the court, and it seems to us that their verdict is conclusive.

As to this work done by train, it was also objected that it was a matter distinct from and outside of the original contracts and was therefore the basis of an action of assumpsit, and could not be recovered for on the original written contract.

Of course no general rule can be laid down as to when a special contract shall be deemed superseded by a subsequent one, or as to when a particular change shall be deemed a mere modification of an original contract, or a substantive and distinct matter from it. Each case will depend on its own circumstances. Looking into the written contract in question, it is apparent that no cast-iron rule as to the mode of doing the work was contemplated by either of the parties. The engineer had extensive powers in enlarging or diminishing quantities of work, changing its location and modifying as exigencies might arise,all details connected with it, and looking at the nature of the undertaking the terms of the written contract, it would seem reasonable to hold that an arrangement with the engineer, by which a particular but insignificant part of the work, in comparison with the whole, should be done in a slightly different way from that originally contemplated, was only a modification of the original written contract, and not such a distinct and substantive contract, as to require the defendants in error to split up their demands into actions of covenant and assumpsit.

If in a sealed contract for erecting a building it were provided that the wood work should be painted 2 coats, and afterwards it was agreed that 3 coats should be put on, such a change would

really be more radical than the one in question, considering the magnitude of our undertaking, yet who would pretend that a distinct action must be brought on a *quantum meruit* for the value of the third coat of paint. *Aiken vs. Bloodgood*, 12 Ala., 221.

Van Buren vs. Digges, 11 How., 461, is an instructive case which affirms the modern rule that where a special contract is not strictly and literally performed, as by mere enlargement of time of performance, yet if by recoupment or extra allowances, justice can be done, and all questions growing out of the special contract be fairly considered and adjusted by the general verdict the action on the special contract shall be sustained and the parties saved the expense of new cross actions.

Cox vs. Carroll, 6 Iowa 350.
Pratt vs. Cozine, 1 Hoff., 79.
Worrall vs. Mead, 40 Vt., 540.
Styker vs. Vanderbolt, 1 Dutch, 482.
Clark vs. Oates, 20 Barb. 42.
Blood vs. Goodrich, 9 Wend:, 68.
Grafton vs. Woodward, 5 N. H. 99.
Putman vs. Miller, 34 do 71.
Watkins vs Hodges, 6 Har. & J., 38.
Nelson vs. Orem, 41 Ills., 18.
White vs. Gilman, 43 do 502.

The point that the testimony as to a supposed payment *under protest* ought not to have been held immaterial, has no force, for the payment made was in a legal sense just as *voluntary* as if Phillips had not used the words supposed.

He was in fact under no legal or moral duress of person or property, and besides his payment then made was in settlement of a branch of the work below Sec. 40, not the subject of litigation in this suit.

The counsel of the Construction Co. offered to prove (transcript p. 67) what the condition and prospects of the Company were when it made default in payment, and upon the objection of the defendants in error, the evidence was excluded and the counsel of the Construction Co. excepted to the ruling.

How could such evidence be material? Suppose the Construction Co. had beeu possessed of ample means, their conduct would only have been the more reprehensible, and it was not proposed to show that *in fact* the officers did not represent themselves to us, as destitute of present means, with no definite prospect of having any in the future, and certainly we were justified in acting upon the admissions of the officers of the company even though they may have been false.

VI.

The counsel of the *Construction Co.*, asked thirteen several instructions to the jury, which were refused by the court, and we are to examine them to see whether they state correct rules of law applicable to the facts in evidence, and if they do, whether they were not substantially given by the Judge, in his own charge, or if not, whether the Construction Co., could have been prejudiced by such refusal.

The *first* instruction asked for the Construction Co. was plainly unsound, for it would not have permitted the jury, to consider the evidence, as to whether the Construction Co. had not excused, or waived the literal performance of the original contract, as to the *time* within which the several sections, of the road, were to be completed, and if the Company had only iron to lay to section 65, (transcript, p. 69,) the waiver which was proved by the plain

preponderance of evidence, involved no loss to the Company, which could make no use of the road, until ready to lay ties and iron on it.

The *second* instruction asked was objectionable for the reason that it assumed a *protest*, when there was none in any legal sense. It also was so framed that it might have led a jury to the false conclusion that if they found the payment of the October estimates was made under protest, they could not examine the evidence, as to whether such protest had been subsequently waived, or any of the evidence bearing upon the question, as to whether a strict compliance with some of the conditions of the original contract had not been excused.

Had this instruction been limited to charging the jury, that the fact of payment of this estimate, under the circumstances proved, was not *alone* conclusive evidence of a waiver we should have no fault to find with it.

As to the *third* instruction asked, it was palpably erroneous in the rules of law, sought to be applied, and was likewise calculated to confuse and mislead the jury. The whole evidence showed that the defendants in error had *elected to consider their contract at an end, as they might, by reason of the default and insolvency of the Construction Co.*, and such being the situation how could this instruction be pertinent for the consideration of the jury. Had the scope of our action been different, were we seeking to recover stipulated payments after an alleged complete performance of our work, then the question as to monthly and final estimates might be of importance. Besides the instruction is incomplete, in itself, for suppose the jury had found "that the contract sued on, was still subsisting, at the date of the last estimates," what then? And this instruction does not connect itself

with any other istruction, by which its obscurity and want of precision might be explained.

The *fourth* instruction is equally unsound, as it would declare to the jury that *an absolute and conclusive waiver*, of default in the payment of the November estimates, was to be presumed from the bare fact that the defendants in error proceeded in their work, after it fell due. *How extensively* this waiver, so to be presumed, was to be construed, the instruction does not inform us, and whether a jury would have construed the language as meaning an *absolute* waiver of any payment, or payment only after a definite or reasonable time, or notice, we can only conjecture *Garrettson vs. Pegg*, 64 Ill., 111. The evidence in the case showed that after the default alluded to, in this instruction, as well as the previous defaults, the defendants in error continued to work on, sustained by hopes fed by the promises of the officers of the Construction Co., till near the close of Nov., 1872, when upon the confession of the Construction Company's officers that it had no means, or hopes of getting any, the defenants in error were reluctantly compelled to abandon their work, done to the time of stoppage at a positive loss, if it had been paid for at the stipulated price; and before entering upon that part of the work from which alone they expected to derive their profit, and holding in their hands vouchers furnished by the Construction Company's officers for unpaid work to the amount of nearly a hundred thousand dollars. This statement, which is undeniable, shows how inappropriate the charge asked would have been in view of the facts.

The *fifth* instruction attempted to exclude from the consideration of the jury any claim of damage growing out of the construction of the supply road, houses for the accommodation of men

&c., if they found that defendants in error "acquiesced in the excuse or reason, if any, given by the defendant (plaintiff in error) for the non-payment thereof (the estimates due) and did not give notice or permission to the defendant (plaintiff in error) to take charge of the supply road or other things now sought to be charged for by the plaintiffs (defendants in error) as having been prepared by them in order to complete the work." If we understand this somewhat obscure statement it is intended to assert as a rule of law, applicable to the case at bar, that the defendants in error must be presumed conclusively to have waived a valid item of special damage by reason of their continuing to work on their contract after the November estimate was due, in the hope that the Construction company's promise of funds would be made good. Surely it cannot be necessary to argue against such a proposition after stating it so that its purport can be comprehended.

The *sixth* instruction asserts a proposition of law having no application to the case before the court. Were we alleging full performance of our contract or its divisible parts, and a right to recover for such performance, then the question whether we could recover without producing the final estimates of the engineer, would be pertinent, but as we have repeatedly shown the scope of this action is different, and if the rule of law asserted in this instruction were pertinent to this case, then if we had been driven off this work by force and arms, by the Construction Co. when duly performing it in exact accordance with the contract, the Construction Co. could shield itself from all responsibillty by showing that we had not the final estimates of its own engineer.

The *seventh* instruction relates to the 15 per cent. retained on the work, and the $15,000 *bonus*, and peremptorily requires the

jury to reject our claim for these sums or any portion of them.

This was money which we had earned, but was withheld simply as a security. The object for which security was retained having ceased by the default of the Construction Co., it would be a strange rule of law that would enable this company by means of its own delinquency to retain for its own use near $35,000 of our money, fairly earned. The charge of the court on this subject (transcript 74 & 79) was fully as favorable to the plaintiff in error as it had a right to ask, it being excused from the payment of interest on these sums though claimed by us.

The *eight and ninth* instructions are open to the same objections as the 7th. The speculative enquiry, as to which party was guilty of a *first* breach of the contract, was unimportant, as that *first* breach, whatever it was, or which ever party committed it, may have been excused, and it is certain that the question of *priority of breach* was not of itself decisive of the right to recover on the contract, as is assumed by these instructions.

The *tenth* instruction is based upon the theory, that the Construction Co., could not be made liable for the special damages, which directly resulted from the breaking up of the enterprise, through its inability to pay, according to the contract, because such a breach, on its part, was not a *prevention or hindrance.* That physical and forcible prevention is not necessary to lay a foundation for our claim for the special damages referred to, in this instruction, and that an interruption of the work by insolvency or inability to meet payments due on the contract,

is enough, when no claim for speculative profits on unperformed work is urged, we have shown by abundant authority.

The *eleventh* instruction relates to a loss upon certain property of the defendants in error, which was taken off by the Construction Co., on cars to Stevens' Point. Whether the small items of damage proved, from this source, was too remote or not, depended upon all the evidence in the case, and we insist that the damage complained of as to these goods, directly resulted form the breaking up of our business, and the scattering of our property, through the failure of the Construction Co. to perform its contract as to payments. At any rate it took the responsibility of carrying off our property, without license from us to Stevens' Point, where it was lost, and it ought not now to be heard, to say that such loss was not an element of damage proper, for the jury to consider.

It is said that the proof showed that these goods were not actually carried off to Stevens Point, till several days after this suit was brought, though it does not appear when they were loaded into the cars. But suppose they were not taken until after this suit was brought, we are not suing for the value of those goods alone, but for what was due us on the contract, and the damage we suffered growing out of our being compelled to abandon it. As an incidental circumstance we show that a part of our plant after suit brought was actually appropiated by the Construction Co. The proof of such a fact, is just as pertinent to enable the jury to judge of our real loss, as would have been evidence on the part of the Construction Co., that after suit was brought, we sold our whole plant for double its first cost.

Wilcox vs. Exrs. of Plummer, 4 Peters, 172 182.
Sedg. Meas. Dams., 106 *et seq.*

The *twelfth* instruction is, as to a trifling item of 70 barrels of cement, ordered on the ground at the request of the Construction Company, as they had a right to, under the contract, but which was not used, and was lost by exposure after it had been brought on the line. This loss grew out of the contract sued on, the cement having been brought on the line, by the direction of the engineer, who *then refused* to have it used. (transcript, p. 56.)

As to the *thirteenth* instruction, there was no proof to support it. There was no evidence whatever that the Construction Co., had suffered any loss by reason of the facts assumed. The road bed was done as fast as there was iron to put on it, and no business was lost by such delay in the completion of the road-bed, even if there had been iron ready, for the testimony shows that there was no business to be accommodated, the line extending through an unbroken wilderness, (transcript, p. 63,) and the proposed basis of estimating damages was the testimony of Phillips, (transcript, p. 68,) and was plainly too remote and speculative to be considered—see the comments of the court on this subject (transcript, p. 80.)

The ground for the objection that the defendants in error could not recover because Hopper had no interest at the time of the breach, is not apparent. The suit was necessarily brought in the names of the parties, who composed the firm of M. T. Seymour & Co , at the date of the contract, (of whom Hopper was one), but *for the use of* the remaining parties, who had bought out Hopper before the breach.

VII.

As to the objection that the Court erred in its charge to the jury in its construction of the character of the contract, and in not holding that the *time* for performance of the several parts of the work was of its *very essence*, and as to what evidence would be sufficient to show a *waiver* of a strict performance as to time, we submit that a fair construction of the written contract, and of the evidence offered on the trial will make it entirely apparent that the Court was fully justified in its charge on these points.—Had the Construction Co. itself been under obligation to complete the work at specific times under heavy penalties in case of default then doubtless the actual contract with the defendants in error would specifically have made the *time* of completion of the very essence of the contract in precise words like the case of *Fitzgerald vs. Hayward, supra.*

Exception was also taken to that part of the Judge's charge which left to the jury the question whether the Construction Co. had waived a literal performance of the contract, as to the *time* within which the different sections should be completed.

As it cannot be denied that there was at least *some evidence* for the jury to consider on this point, the objection can have no force unless this court shall hold that it is not possible for a party to a written contract to waive a particular stipulation in his favor, without setting the written contract at large, and leaving the parties rights to be mutually enforced under a substituted parol agreement, which seems preposterous.

Ransom vs. N. Y., 4 Blatchf.. 157.

That part of the charge in which the jury were told that the defendants in error were justified in abandoning the further prosecution of the work, if they found from the evidence that the Construction Co. had confessed its inability to pay what was due on the contract for work already done, or to provide for future work, was also excepted to.

But to hold this charge unsound, would compel a contractor to continue to work for a confessed insolvent, as a condition to his right to recover anything for what he had done, before the confession of insolvency and failure to make payments due.

The various exceptions taken to the charge of the court, as to the rule in estimating damages cannot be sustained. As to the elements constituting these damages, the Judge was careful to discriminate such as were the natural and necessary result of the stoppage of the work from such as were too remote. Speculative damage was not allowed to us, for our being deprived of our profit anticipated on the most desirable part of the work, nor was the Construction Co. allowed a prospective profit, that might possibly have been made if the road had been finished faster. But as to this suggestion, we have shown that we did actually build the roadway, as fast as the Construction Co. had iron and ties to put down on the line; and it may also be pertinent to enquire how, if any such profits had been lost from delay, it could possibly *damage the Construction Co.*, as it is to be presumed that those profits would go to the *Railroad* Company, and not to the Construction Co., which simply held a contract to perform the work for the Railroad Company.

VIII.

Exception was also taken to the action of the court, in submitting to the jury for a special finding, the question of the liability of the Construction Co., for the extra cost of the work done by train. The act of Congress, requiring the practice of federal courts to correspond with that of the States, in which such courts were held, was in force at the time of the trial. The statute of Illinois, then in force, also provided that "the court may, at the request of either party, require the jury to render a *special verdict* upon any fact or facts, in issue in the cause, which verdict shall be entered of record, and proceedings had thereon, as in other cases. When the special finding of fact is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly." 2 *Gross Stats.*, 289. (In force July 1, 1872.)

While the verdict as to this work done by train, was not a special verdict, at common law, and as defined by this court in *Saydam vs. Williamson*, 20 How., 427 and *Mumford vs. Wardwell*, 6 Wall., 423, yet it was in strict accordance with the practice in Illinois, under the statute referred to.

The special verdict was precise, and in no way inconsistent with the general verdict. The jury say the $11,708 "should be added to the amount of damage found by the general verdict." The general verdict was for $107, 353.44. In effect, then, it was a verdict for the aggregate, viz: $119,061.44, and so was a proper basis for the judgment for that sum. An exception was taken "to the decision of the court in submitting to the jury *such form for a special finding*," (transcript p. 81) but no further exception was taken to this part of the proceedings below.

We infer that under the statute in question, there was no error in submitting to the jury the form of special finding disclosed by the record, and the evidence amply justified the jury in the conclusions to which they came on the matter so submitted.

But however informal the verdict might have been, it is no ground for reversal under the 32d Sec. of the Judiciary Act of 1789, which forbids the reversal of a judgment for any want of form in the proceedings except such as shall have been specially pointed out by demurrer. *Laber vs. Cooper*, 7 Wall., 570.

The motion in *arrest of jndgment* was also properly overruled, because the Construction Co. refused to stand by its *demurrer* to the declaration, when it was overruled, the jurisdiction of the Court not being disputed.

Rouse vs. The County, 2 Gilm., 99.
Edward vs. Blunt, 1 Strange, 426.
Creswell vs. Packham, 6 Taunt., 650.

Besides, the objection which was made the ground of this motion, that our action should have been assumpsit and not covenant, was not *matter of substance*, and therefore not a basis for such a motion after a trial on the merits, either under the federal statutes of jeofails, before alluded to, or those of Illinois, 1 *Gross Stat.*, 11, and especially was this so under the Practice Act of Illinois, governing the practice in the federal courts in that State, and which allows an action of assumpsit on a *sealed* instrument, and permits a court at any time before final judgment to allow pleadings to be amended by "changing the form of the action, and in any matter, either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action," &c.

2 *Gross Stat.*, 286.

Matters pertaining merely to *practice* are not the subject of review in this court.

Parsons vs. Bedford, 3 Peters, 433.
Carvers vs. Astor, 4 do 1.
R.R. Co. vs. Stimpson, 14 do 448.
Turner vs. Yates, 16 How., 14.
Walbrum vs. Babbitt, 17 Wall., 577.

IX.

It seems to us that the exceptions to the rulings and instructions of the Court are not in compliance with the 5th and 6th sections of the amended 21st rule of this Court. At the present term, this Court in *N. W. Packet Co. vs. Clough*, said: "A party who complains of the rejection of evidence, must show that he was injured by the rejection. His bill of exceptions must make it appear that if it had been admitted it might have led the jury to a different verdict. This must be understood as the practice of this Court, and such is the requirement of the 21st rule. By that rule it is ordered that when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the Court to see whether the evidence offered was material, for it would be idle to reverse a judgment for the admission or rejection of evidence that could have had no effect on the verdict." We submit that the meagre references in the bill of exceptions to the evidence excepted to on the trial, are wholly insufficient to show this court

that the verdict would probably have been different if such evidence had not been admitted.

Deitsch vs. Wiggins, 15 Wall., 539.
Allen vs. Blunt, 2 Woodb. & M. 121, 152, 154.

It will be observed that the evidence excepted to was admitted *subject to being rejected by the Court in its charge to the jury*, if upon the whole case it was found irrelevant or incompetent.—The whole charge of the Judge is not given, so that this Court cannot surmise, except from the detached portions of the charge set forth in the bill of exceptions, whether the Judge did or did not exclude from the jury the evidence objected to.

Wiggins vs. Burkham. 10 Wall., 129.

If there was any competent evidence to sustain the plaintiff's theory of the case, and if the Court committed no material error in admitting or rejecting evidence or in its charge to the jury, then the verdict was conclusive, although based upon an improper estimate of the evidence, after the motion for a new trial was overruled, as such matters can only be considered on motion for new trial in the court below.

Schuchard vs. Allens, 1 Wall., 371.

If all the testimony in this case were set out in the record, this Court could not examine it with a view of determining whether it was sufficient to support the judgment.

Generes vs. Campbell, 11 Wall., 199.

X.

On a review of the matters presented by this record, it is apparent that all objections, which this court can consider, resolve themselves into objections to the charge of the court; for the evi-

dence to which exception was taken, in the course of the trial, was admitted subject to being ruled out, in the charge, if found upon the whole case incompetent, and all objections, to the charge, will be found to center in a single one, that the court ought not to have permitted an action on the *special* contract, to proceed after it appeared from the evidence, that the different sections of the work had not been completed, at the precise times originally stipulated.

If the Court was right in holding in its charge to the jury, that inasmuch as the original contract looked to contingencies, which would make completion of the several sections, on the several days specified impossible, through changes ordered by the engineer, that therefore *time* of completion of the several parts of the work, could not have been deemed material by the parties to that degree that a later performance to the satisfaction of the Construction Co., would not be a *substantial compliance with the original contract*, then it must be conceded, that in this court all other questions are foreclosed by the verdict of the jury, and the order overruling the motion for a new trial.

But suppose the court below committed a technical error in sustaining covenant, when assumpsit was the proper remedy, will this court for such a reason reverse this judgment, when the Construction Co. had a full opportunity to make every defense, and the amount of the judgment is a meagre compensation to us. As already shown the state and federal statutes of jeofails, the Practice Act of Illinois, and the whole tenor of the dicisions of this court, on questions of mere practice, forbid subjecting us to so unreasonable a hardship.

"There was a time in the history of the law when, like everything else of that day, it was a system of metaphysics and

logic, and when the cause was decided, without the slightest regard to its justice, solely on the technical accuracy of the pleading on the several sides. Defect of form in the plea was defect of right in him who used it. At that time, payment of debt and interest on a bond the next day after it fell due, was no defense in a court of law; nay, it was no defense to prove payment without an acquittance before the day; nay if you pleaded and proved a payment, which was accepted in full of the debt, yet you failed unless your plea stated that you paid it in full, as well as that it was accepted in full, or if you pleaded it as a payment when you ought to have pleaded it as an accord and satisfaction."

Milliken vs. Brown, 1 Rawle, 397.

But said a distinguished federal judge, in our day, "although a declaration may be informally framed, yet if it embodies all that is essential to enable the plaintiff to give evidence of his right and of its violation by the defendant and affords the defendant an opportunity to interpose the defenses allowed by law, the court will not encourage objections merely critical, but will seek even on special demurrer to sustain the pleading,"

Wilder vs. McCormick, 2 Blatchf, 31.

And see *Rogers vs. Marshal*, 1 Wall., 644.

Was not the plaintiff in error, in a three weeks' trial below, allowed the fullest opportunity to make its defense? Not only was this the fact, but the Court and jury allowed in its favor, under the plea of set-off, $26,869.00, which, without any permission on our part, it voluntarily paid to our employees, thus in many cases depriving us of all hope of collecting our cross-demands from such employees. That every right of the Construction Co. was carefully guarded, and every doubtful point decided

in its favor is palpable from the extracts in the record from the careful and comprehensive charge to the jury, and from the amount of the verdict of the jury, which as we have shown, was less than actual compensation for money admitted to be due for our work, and the damage directly resulting from the breaking up of our undertaking, without reference to the profits at which we had actually sublet that portion of the work from which alone we could make any profit on our contract.

How could the Construction Co. reasonably expect on a new trial, to reduce the amount of our recovery, and if it is plain that it could not, will this Court seek by technical refinements, foreign to federal courts, and to the age we live in, to drive us into another three year's pursuit of the phantom of justice, to end, possibly, in overtaking a legal myth—a corporation without personal responsibility or property, beyond the bonds of an uncompleted Railroad located in the wilds of Northern Wisconsin.

SLEEPER & WHITON,

Atty's of Defts. in Error.

Submitted Judge Drummond
Motion 1-646
Denied 18

In the Supreme Court of the United States.

OCTOBER TERM, 1875. No. 44.

THE PHILLIPS AND COLBY CONSTRUCTION Company, *Plaintiffs in Error.*
vs.
MARK T. SEYMOUR, ELIJAH S. ALEXANDER, J. O. Rutter, and Andrew J. Hopper, who sue for the use of Mark T. Seymour, Elijah S. Alexander, and J. O. Rutter, *Defendants in Error.*

To the Honorable the
Supreme Court of the United States:

The petition of Mark T. Seymour, one of the defendants in error, respectfully represents:

That he is one of the defendants in error in the above entitled action; that said defendants in error compose the firm of M. T. Seymour & Company, for whose use said action was brought and prosecuted; that your petitioner is entitled, in settlement of said firm's accounts, among the members thereof, to receive one-sixth part of the net assets thereof; that the judgment hereafter to be entered under the direction of this Honorable Court in the above entitled action constitutes a large part of said assets; that said Alexander and Rutter, your petitioner's co-defendants, are seeking to deprive your petitioner of his rightful share of said assets, and of the proceeds of said judgment.

And your petitioner further represents, that a suit in equity is now pending in the circuit court of Cook's county, in the State of Illinois, between your petitioner, as Complainant, and said Alexander and Rutter as Re-

spondents, wherein your petitioner prays for an account, and for an inspection of the books and papers of said firm, which have been wrongfully concealed by said Alexander and Rutter, and for a Receiver of said firm; and for an adjustment of the firm accounts under the direction of said Court.

And your petitioner further represents, that he will suffer great loss and damage if the proceeds of said judgment are collected by said Alexander and Rutter; that he verily believes, and therefore avers, that the accounts of said partnership have been falsely kept, and the assets of said firm fraudulently managed, and concealed from your petitioner by said Alexander and Rutter, with the intent on the part of said Alexander and Rutter to defraud your petitioner of his just rights in the premises, and of his share in the proceeds of said judgment.

And your petitioner further represents, that said Alexander and Rutter have, without the consent of, or any notice to, your petitioner, caused a *remittitur* of a large amounted of said judgment, to wit, eleven thousand seven hundred and eight dollars, to be entered and certified to this Honorable Court in said action; that said *remittitur* was executed without any authority therefor from your petitioner, by Messrs. Sleeper and Whiton, who are the Attorneys of said Alexander and Rutter, in the said suit in equity before mentioned, now pending between your petitioner and said Alexander and Rutter, in the said Circuit Court of Cook County, and who are not, and never have been, the Attorneys of your petitioner to release any portion of said judgment, or for any such purpose as is set forth in said *remittitur*; and your petitioner verily believes, and therefore avers, that said *remittitur* is null and void, and that the same was so as aforesaid entered with intent to fraud your petitioner, and that your petitioner is advised and verily believes, that said *remittitur*, if confirmed, will bar his right of action against said The

Phillips and Colby Construction Company for the amount so remitted, and that said *remittitur* will greatly damnify and injure your petitioner; and that your petitioner has commenced proceedings in the Circuit Court of the United States for the Northern District of Illinois, to strike out of the record said *remittitur*, and to reverse the order of said Court thereupon based.

Wherefore, to the end that justice may be done in the premises, and that your petitioner may cause said *remittitur* to be stricken from the record of the said Circuit Court of the United States for the Northern District of Illinois, and that the same may not be confirmed by this Honorable Court without an opportunity for your petitioner to be heard thereon, and without the consent of your petitioner, and that your petitioner may, before the issue of execution in said action, procure the appointment of a Receiver to collect said judgment, and that the proceeds thereof may be justly divided among the several persons entitled to share therein, under the direction of the said Circuit Court of Cook County.

Your petitioner prays, and now moves this Honorable Court, not to accept said *remittitur*, but to order the same to be returned to the said Circuit Court of the United States for the Northern District of Illinois, with instructions to set the same aside, if it shall appear that the same is improperly executed and entered without authority from your petitioner; and further prays, that this Honorable Court will not send down the Mandate in said action without notice being given your petitioner, until the same would as of course, according to the practice of this Honorable Court be issued, to wit, at the end of the present term thereof.

And your petitioner will ever pray.

MARK T. SEYMOUR,
Petitioner.

R. D. MUSSEY,
Solicitor and of Counsel for Petitioner.

UNITED STATES OF AMERICA,
Southern District of New York. } ss.

I, Mark T. Seymour, who have set my hand to the foregoing petition, do make oath that I am one of the defendants in error in the action above entitled, and that the statements contained in said Petition are true, so far as made upon my own personal knowledge, and that as to those made upon information and belief, I believe them to be true.

MARK T. SEYMOUR.

Subscribed and sworn to before me, this tenth day of January, 1876.

JOHN A. SHIELDS,
U. S. Commissioner,
Southern District of New York.

UNITED STATES OF AMERICA,
Southern District of New York. } ss.

I, Mark T. Seymour, who have set my hand to the foregoing petition, do make oath that I am one of the defendants in error in the action above entitled, and that the statements contained in said Petition are true, so far as made upon my own personal knowledge, and that as to those made upon information and belief, I believe them to be true.

MARK T. SEYMOUR.

Subscribed and sworn to before me, this tenth day of January, 1876.

JOHN A. SHIELDS,
U. S. Commissioner,
Southern District of New York.

Supreme Court of the U. S.

OCTOBER TERM. 1874.

No 255

PHILLIPS & COLBY CONSTRUCTION COMPANY,
Plaintiff in Error,
vs.
MARK T. SEYMOUR, et al,
Defendants in Error.

Error to Circuit Court Northern Dist. of Illinois.

Supplementary Brief for Defendants in Error.

By SLEEPER & WHITON,

STILLMAN & BENEDICT, Printers, 166 Washington St., Chicago.

Supreme Court of the U. S.

OCTOBER TERM, 1874.

No. 255.

PHILLIPS & COLBY CONSTRUCTION COMPANY,
Plaintiff in Error,
vs.
MARK T. SEYMOUR, et al,
Defendants in Error.

Error to Circuit Court Northern Dist. of Illinois.

Supplementary Brief for Defendants in Error.

SINCE the printing of our brief in this case, we have been favored with an inspection of the able and elaborate argument of the counsel for the plaintiff in error.

In the little time allowed us to review it, we cannot attempt any labored reply, but shall content ourselves with a reference to what we deem the essential turning points in this controversy.

Although counsel, by an apparently ambitious display of skill in legal hair-splitting, has been able to subdivide his objections to our recovery into 45 distinct grounds of alleged error,

yet we believe that properly combined they all resolve themselves into the following:

1. Error in admitting evidence and in instructions, as to the several matters of damage claimed by us to have resulted directly from the breaking up of our undertaking.

2. Error in refusing instructions.

3. Error in rulings and instructions on the claim of *waiver* of strict performance as to time of completion of certain sections of the work.

4. Error in rulings and instructions as to the effect of a stoppage of work from non-payment of estimates, in the absence of physical prevention.

5. Error in rulings and instructions as to certificates of the Engineer.

6. Error as to rulings and instructions in relation to *bonus* and *retained percentage.*

7. Error in rulings and instructions as to the extra work done by *train.*

8. Error in instructions as to claim of set-off, of plaintiff in error.

Such objections as that this Wisconsin corporation should not pay Wisconsin interest at 7 per cent., but Illinois interest at 6 per cent.; that we were allowed improperly to recover for the December estimate; that Hopper had no interest in some items of chattel property, about which there was some testimony when we were endeavoring to show some of the items of loss, growing out of the breaking up of our enterprise; that Phillips made a payment under an alleged protest, on work not any longer the subject of controversy; that Alexander and Wellman were both

allowed to testify as to the object of the latter in writing certain letters to the former; and that plaintiff in error should have been allowed to prove that the effect of the Boston fire was to disappoint well-founded hopes of negotiating certain bonds; we do not deem of sufficient importance to require replies.

It is quite obvious from the authorities cited and the whole tenor of his argument, that counsel for plaintiffs in error and ourselves look upon this case from different stand-points, or rather see two totally different cases.

To him, this seems the case of one entire and dependent contract, in no wise different in the principles involved from the case where a man agrees to build a house of a specified character, by a certain day, and for a certain price to be paid on its completion, according to contract; and so he cites such cases as *Hoy vs. Hoy*, 44 Ills., 499; *Van Kirk vs. Talbot*, 4 Blackf., 367; *Palm vs. Railroad*, 18 Ills., 217; *Jewell vs. Schroeppel*, 4 Cow., 564; *Dermott vs Jones*, 23 How., 220; *Slater vs. Emerson*, 19 How. 224; *Bourland vs. Sickle*, 26 Ills., 449; *Sherwin vs. R. R. Co.*, 24 Vt., 347, and *Kinney vs. Sherman*, 28 Ills., 520; all of which were contracts of this character.

But we, on the contrary, in our former argument, attempted to show that this was a case of *independent covenants*, that the original contract contains nothing to show that *time* was deemed material, nor was there any evidence on the trial that precise dates of completion were of importance to the plaintiff in error, and that from the whole tenor of the contract it was apparent that all parties contemplated a completion of the different sections later than at the precise dates specified; as the engineer could at any time change the plan of work, hasten it, or stop it altogether, as he pleased, and that in a contract of this character where our

rate of progress had been satisfactory to the plaintiff in error, we had, in this matter of time, *really complied with the contract according to its spirit*, if not its letter, down to the time of the stoppage of work. We further showed that while we were so performing our contract, it suddenly appeared that the plaintiff in error was practically insolvent and unable to give the least encouragement of ability to pay for future work, or even the very large sum then due us.

The result was, that everything came down by the run—it was a case of collapse. We had an army of angry men after us, demanding pay, and threatening violence, and a long list of sub-contractors, demanding damages on account of their contracts being broken up. The plaintiff in error was perfectly helpless, and all acted upon the Waterloo cry: *sauve qui peut.*

We had gathered together an immense force of men, teams, tools and supplies in an almost unbroken wilderness, and the question was what should we do under such peculiar and unforseen circumstances. It is not necessary to prove that in such an emergency we did the wisest thing, although we believe we did.

But what is the advice which counsel on the other side would have given us if we had called on him at that time.

He would have said, gentlemen, I perceive your contract with this Construction Co. was under seal, and I learn that you have not up to this time finished the sections of your work at the *precise dates* mentioned in this sealed contract. This precludes you from suing on this contract, although the Construction Co. was entirely satisfied with your rate of progress, and has given you estimates for such work, because a sealed contract must be *precisely performed*, nor will an action of assumpsit lie because you have not completed your contract according to its terms, and

you have no legal excuse for stopping work. This Construction Co. is *merely suspending payment*, not *interfering* with your work and it was essential to your right to recover anything, that you should go on and complete everything on *contract time*, whether that point was waived or not, and then you would have been at liberty to take a judgment for your pains against this insolvent corporation; provided, however, that you could first catch its late Engineer, and from him get estimates in due form. Nor can you claim the $35,000 for *bonus* and retained percentage actually earned by you, for this Construction Co. can manage to keep it, by ruining you in retaining the estimates due, and so putting it out of your power to complete the 7 miles of road, which were to be finished before such money was to be paid.

Thus our learned friend would readily have shown that while owing us near a hundred thousand dollars, we were totally without remedy, and all his exceptions on the trial and arguments here show that while unwilling plainly to avow it, such is the real theory of his defense in this case.

Let us state a fair test of the validity of such a theory, in construing a complicated railroad construction contract covering 3 or 4 pages of fine print.

Suppose the Construction Co. had not broke down, but that the defendants in error had brought a suit in covenant, on Nov. 20, 1872, for the estimates actually delivered to them by the Engineer, prior to that date.

Could this Construction Co. defend on the ground that the work for which these estimates were given, had not been done on contract time, and insist that their plea to this effect was not answered by a replication, that we had done the work under the contract, in such time as was satisfactory to the Construction

Co., and its Engineer, as was evidenced by the estimates themselves?

But our recovery is mainly based on estimates given after alleged defaults on our part.

Now if it is clear that we could sustain covenant on the estimates, shall we after the collapse of the enterprise, be compelled to split up our claims into actions of covenant on the estimates, and assumpsit for the extra expense of the train work, bonus and retained percentage, and proximate damages, which resulted from the break down.

We do not understand that whatever may anciently have been the rule, the modern action of covenant is so hampered that we cannot prove the whole damage which results from the infraction of a sealed contract, and so it was held in the numerous cases cited by us at page 16 of our former brief.

The true doctrine is well summarized in the following language:

"The validity of many of these defenses resting on the act or default of the other party, must depend upon the question which is sometimes difficult, whether the contracts are dependent or independent. There are cases and especially some early ones, which seem to be severe and more technical than rational, but of late the courts incline to decide these questions as good sense and common justice require. But there are rules by which they are guided in this matter, if not controlled, and we would add to what we have already said on this subject that the classes of engagements contained in a contract—dependent, concurrent and independent—may be thus distinguished: Where the agreements go to the whole of the consideration on both sides, the promises are dependent, and one of them is a condition precedent to the

other. If the agreements go to a part, only, of the consideration on both sides, and a breach may be paid for in damages, the promises are so far independent."

2 *Parsons' Contracts*, 678.

Having thus again adverted to the wide difference between opposing connsel and ourselves as to the theory and scope of this action, we will now briefly notice the above alleged errors in the record in the order stated.

1.

Did the Court below err in admitting incompetent evidence as to what constituted the damage of the defendants in error, growing out of the necessary abandonment of their contract.

The propriety of the rulings and instructions can only be fairly judged by an inspection of the whole charge of the Court, a certified copy of which we present as explanatory of the case, for while it is not in the record, we think we may fairly allude in argument to an authentic copy.

The subject of the contract was extensive, and the contract itself, prepared by shrewd railroad attorneys, was, as usual in such cases, stuffed with complicated details, bristling with forfeitures like an insurance policy, and all liable to to be shifted, without notice, from time to time, at the caprice of the Construction company, or its engineer, yet, probably inadvertently, conceding to us some legal rights.

If we got estimates, we suppose that foreclosed all question as to whether we were entitled to them. But if, after we received estimates for work done, we, with the approval of the

Construction company, continued to work on, in good faith, no direction being given to stop work, or in any manner change our course, and if the first intimation of trouble is a statement from the officers of the Construction company, that the Boston fire, or some other calamity, has suddenly overwhelmed the company, and that we must save ourselves in the best way we can, and if, under such circumstances, we abandon the enterprise, what is the true measure of damage?

It would be very strange, if in such a chaos as resulted, there should not be a multitude of minor questions as to what the Construction company would be responsible for, or if in a three week's trial, some small scraps of irrelevant matter should not creep into the record, but taking a broad view of the case, we claim that a more stringent rule as to damage was enforced against us than the facts warranted.

Particular exception was taken to the allowance by the jury of our claim for ties, amounting to $2,167.25. But this claim was duly certified by the engineer, and attached as a fly to the November estimate. (Transcript, page 63.) The item was otherwise proved by the testimony of Alexander and Quinn. (Transcript, pages 57, 63.) It is claimed also that the jury were allowed to find the sum of between four and five thousand dollars as due for transporting men to the line. By examining our analysis of the probable elements constituting the verdict, it will be seen that we allow nothing for this item. (See our former brief, page 7.) But the suggestion is wholly groundless. It is true that we paid out some $5,000 for transporting men to the work, and it is true that we had no advantage from the labor of those men who came late on the work.

The Construction company proved that they advanced us

at a certain time $3,453.75 on account of transportation. The jury may have thought that this sum was a fair equivalent for what we paid to get men on the line who never worked for us.

Again, a point is made, that our declaration claims only for loss on *houses* erected to accommodate our men, and the court allowed evidence as to loss on *tents*. What are called tents, for the accommodation of men on railroad work, might with equal propriety be called houses, as all temporary erections of boards and cloth combined, and even where boards alone are used, are popularly called tents. If we were doing our work with an expedition satisfactory to the Construction company, down to the time of the stoppage, it does not lie in the mouths of its officers to say, if you had finished your work as rapidly as originally contemplated, you would not have needed these houses.

The clause in the contract of January 25, 1872, providing that it might be terminated on thirty days' notice, and that in such case the Construction company should pay for our hay, grain, and provisions, has no application. Had such a notice been given, we should have prepared ourselves for the storm, and saved an outlay and loss of many thousands of dollars. The same observations apply as to the supply road, we only asking compensation for that part which lay beyond section 53. We made the best disposition we could of what remained of our plant after the stoppage, and it was for the jury to say, after a review of the whole field, what our legitimate damages were, under the careful and comprehensive charge of that court.

As to the stuff carried off by the Construction company to Stevens' Point in cars, and there lost, it may be true that it would be the subject of an action of trover, but as a part of the transactions connected with, and an element of the damage

growing out of, the breaking up of the enterprise, the evidence of such loss was competent for the jury to consider.

Much stress is laid on the item of seventy barrels of cement costing $267,50, and the item of $288,86, the expenses of the agent Voak, employed to collect and dispose of the scattered miscellaneous property of the defendents in error along the line after the explosion. It seems unnecessary to waste time upon such trifling items, but it is apparent that both items were a fair subject for the consideration of the jury. The loss to us of these amounts cannot be denied, and that loss resulted from the default of the Construction company. The same may be said of the item of $140.00 for telegraph poles. The evidence upon which the charge of the court below was based, (Transcript, 78,) is not preserved in the bill of exceptions, and this court therefore will infer that the evidence justified the charge, as would plainly appear if we were at liberty to go outside the record and state it.

The case of *Fitzgerald vs. Hayward*, 50 Mo., 524, referred to by us in our former brief, and very frequently cited by opposing counsel, did hold that where a stoppage resulted from mere non-payment of estimates, *anticipated profits on uncompleted work* could not be recovered.

The distinction made in that case is opposed to the clear weight of authority. (See cases cited at page 18 of our former brief.) But allowing the rule to be as laid down in *Fitzgerald vs. Hayward*, the court below ruled out all our evidence as to anticipated profits on uncompleted work, after five days consumed in offering it.

We were tied down to actual money earned, and the direct damage resulting from the breaking of our contract. What

these damages were was necessarily a question for the jury, on a fair review of the whole situation, and the court will perceive, by a inspection of the entire charge, that the jury were duly cautioned to allow no damage without evidence of its true amount. We shall not weary the court by again referring to all the details making up our damages. Had the verdict been larger by twenty-five thousand dollars, it would not compensate our clients for the costs, delay, confusion, and embarrassment which resulted from this catastrophe.

We think this court will hold that when a construction company has the temerity to invite a thousand men into a wilderness to build a line of railway, and incurs an indebtedness to confiding contractors to the extent of a hundred thousand dollars, without funds actually provided for such an undertaking, that it is a serious responsibility, and that if the enterprise breaks down in consequence of such recklessness, full damages for work done, and for direct losses growing out of the necessary abandonment of further work, should be awarded against the delinquent party.

2.

As to the alleged error in the refusal of instructions, we shall not again review them, but simply reiterate that that they were based on erroneous construction of the rights of the parties, or with proper modifications were actually given to the jury.

3.

A large portion of the argument of opposing counsel is devoted to an attempt to show that if we had proved a distinct *waiver* of the completion of certain sections of the work at the times specified in the contract, that this would not avail us, for it would be only the substitution of a subsequent parol contract, on which assumpsit alone would lie. In support of this proposition, *Sherwin vs. R. R. Co.*, 24 Vt., 347, is much relied on. The facts do not appear in the report of this case, but we infer it was a case of an entire and dependent contract, as in the case of building a bridge for the R. R. Co., to be paid for on completion, and such being the case, the decision was right and in conformity with *Slater vs. Emerson*, 19 How., 224, and other cases of entire and dependent contracts cited by counsel.

But we have repeatedly shown that cases of this sort are inapplicable to the case at bar.

What we claim is that in the case of a divisible contract of the character now before the court, where it is obvious that precise dates of completion of portions of the work were not deemed essential by the parties, but on the contrary where it was plainly anticipated that the dates would probably be changed, if with the concurrence of all parties concerned, those dates are changed, and the work is performed to mutual satisfaction at the dates last agreed on, then the contract *is performed according to its true spirit*, and it cannot be said to be a case of waiver of the original written contract, and the substitution of a subsequent verbal one for it.

It is not every trifling change of a written contract that will lead a court to say that a later verbal one has been substituted in

its place, even where that contract is single and entire. Cases occur where the time of performance was the one essential thing, as was the case of *Slater vs. Emerson*, but in the case at bar this court can see that the matter of a few days delay in the completion of sections of the work, could harm no one but ourselves, for we were doing our work faster than the iron could be procured for the track, and faster than the Construction Co. could find means to pay estimates.

Under such circumstances, if the Construction Co. does not object to the rate of progress, but encourages us to proceed and to trust to promises of payment of overdue estimates, it is estopped by every principle of honesty and fair dealing from saying that it did not exercise its rights reserved in the contract, to have the dates of performance changed to correspond wlth the dates of actual and satisfactory performance.

4.

Much space is devoted in the argument of counsel for the Construction Co. to an attempt to show that we were not *prevented* from completing our work, under the contract, by a mere stoppage of payment, and it is argued that there can be no recovery of anything on the contract, because we do not aver and prove a full performance, or a tender of full performance, and it is supposed that *Fitzgerald vs. Hayward, supra*, sustains such a position.

In quoting from this case on page 35 of his brief, counsel, doubtless unintentionally, copies a paragraph, which taken alone would leave the impression, that the court held that there could

be no recovery where the whole work was not performed, unless there was proof of a *prevention by wrongful acts*, of the defendant. What the court decided was that profits *on unperformed work*, could not be recovered, when the plaintiff stopped merely on account of non-payment of money due him on his contract.

Such a rule although as already stated, not sustained by authority, cannot affect us, for the reasons we have repeatedly stated.

5.

Counsel for the plaintiff in error make an elaborate argument to show that we have no right to recover anything for which we do not hold the certificates of the Engineer.

We are aware that in a proper case, the rule contended for is applied, and have no fault to find with the numerous cases, cited by counsel, where such a rule was applied. While our work was proceeding, under the contract, we could only ask pay on estimates of the Engineer, but when the explosion came, and we attempted to save what we could from the wreck, what should we have done. The Engineer could only certify while work was proceeding in due course, under the contract. So far as he had certified, we did not seek to overhaul his acts, but where he was incompetent to certify, in matters of damage not capable of accurate computation, of course we did endeavor to obtain his certificates.

The reason of a rule ceasing, the rule ceases.

6.

A very labored attempt is made to show that we were not entitled to recover for the bonus and retained percentage, because by the contract we were not entitled to either of these items until we completed the line to section 60. Of course if the construction company had not failed, and we were proceeding with our work with no excuse for stopping, we could not have demanded these items, except as provided in the contract, but a different question arose after the explosion. Was the Construction company to be allowed to keep these items though fairly earned by us, simply because it broke up the undertaking by failing to pay us our estimates? If so, it would be an enormous premium for its breach of contract with us. Counsel say that at our own expense, and without hope of remuneration, we ought to have fully completed the remaining seven miles to make sixty sections, before demanding these moneys already earned by us. In other words, pay out perhaps forty thousand dollars to entitle ourselves to a judgment against an insolvent corporation for thirty-five thousand. Such cannot be the law, under such circumstances, and when the court below refused us interest on these sums, and scaled down the percentage to correspond with the amount of work actually done, we were certainly, on a final adjustment with this construction company, entitled to judgment for the balance.

To the suggestion that we ought to have taken Portage county Bonds to apply on the retained percentage, it is enough to say that no such bonds were ever offered to us.

7.

Counsel devote much space to the question as to whether for the extra cost of the work done by train—$11,708, we could recover in this action.

There could be no doubt, on the evidence, of our right to recover this sum in some form of action, and the only question was whether it could be recovered for in this action or must be made the subject of a distinct suit.

It was a mere incident of our written contract, and grew directly out of its performance, and no good reason is perceived why we should have been compelled to split our demands into two suits.

As counsel cites no authorities on this branch of the case for his positions, we submit this point, referring to its fuller examination in our former brief.

8.

But complaint is made because it is said that claims of set off, on the part of the plaintiff in error, were taken from the jury. The fullest of opportunity was allowed it, to prove any items of set off, and in fact contrary to our objection over $30,000 were allowed for voluntary payments to our men.

The other claims to set-off, that were withdrawn from the jury, were of so purely speculative a character that it can need no further argument from us to justify the action of the court.

In conclusion, we shall barely advert to the point made by

counsel, that our replication to the 5th plea, was not sustained by *affirmative proof*, because it is said we assumed the burden of showing that when the work was stopped, we were in fact prosecuting it *with such vigor and means as would have enabled us to fully complete the work within the time limited by the contracts.*

This clause in the replication was inserted simply as an averment of the diligence and good faith with which the plaintiffs below were attempting to perform the whole work, but in the very nature of things, was in any literal sense, incapable of absolute proof, for how can a man *prove* that he will with the means in hand, complete a job by any certain day in the future?

We ought also to invite this court to contrast the tabular statement in our former brief, at page 7, with that at page 96 of the brief of counsel for the plaintiff in error, He begins by omitting $2,422.04 of accrued interest on the estimates. He claims credit for money paid on Folsom & McConnell's pay-rolls, $6,215.13, an item about which there was no legal proof, whatever, to charge us. (Transcript p. 69.) The payment, if made, was purely voluntary on the part of the Construction Co., and without notice to us, and to men, in many cases, largely indebted to us, and wholly irresponsible.

Rejecting this Folsom & McConnell claim, and allowing the voluntary payment to our laborers by the plaintiff in error, of $26,869.00, (transcript p. 65), and the court will readily perceive that our theory of the elements constituting the verdict is at least reasonable, and the verdict itself not too large.

But we do not suppose that this court after the matter was considered in the court below, on the motion for new trial, will enter into any nice investigations to determine whether the verdict was a little too large, or too small.

Hogg vs. Emerson, 11 How. 587, 608.

We may also add that if this court should be of opinion that our claim for the extra cost of the work done by train ought not to have been included in the judgment, and should for that reason reverse the judgment, it would still proceed to enter the proper judgment on the general verdict of $107,353.44, as that verdict was complete in itself, and the proper basis for a judgment to that amount.

Insurance Co. vs. Boykin, 12 Wall., 433.
Garland vs. Davis, 4 How., 131.
Ross vs. Taylor, 63 Ills., 216.

But we cannot doubt that in the present condition of the law and especially as it is applied in this court, it will be held unnecessary that we should divide our causes of action growing out of the contract in question into separate suits of assumpsit and covenant. As to such "technical niceties," Justice Story, in *Bottomly vs. U. S.*, 1 Story, 152, said: "The days for such subtilties in a great measure has passed away."

The questions which this court can consider on this record, though somewhat obscured by a mass of pleadings, and details in the evidence and rulings on the trial, will be found, when fairly apprehended, to be neither numerous or complicated, and we submit them in the full assurance that if it shall appear that

substantial justice has been done between the parties by the judgment below, these questions will be investigated with a sincere desire that such adjudication shall stand, if compatible with those rules of law which, especially since the days of Mansfield, have been from time to time more perfectly moulded to attain the real objects of the institution of all courts of justice.

SLEEPER & WHITON,

Attys. of Defts. in Error.

(FULL TEXT OF JUDGE'S CHARGE.)

In Circuit Court of the United States,

NORTHERN DISTRICT OF ILLINOIS.

May 17th, 1873.

MARK T. SEYMOUR, et al,
vs.
PHILLIPS & COLBY CONSTRUCTION COMPANY,

The declaration in this case charges in substance, that on the 7th day of September, 1871, A. J. Hopper, H. S. Boyle, and M. T. Seymour, entered into a contract with defendant for the construction, by said Hopper, Boyle & Co., of all the work on the forty miles of Wisconsin Central Railroad, from Stevens' Point west. And on the 25th of January 1872, the parties entered into a further contract, for the construction of one hundred and twenty miles of said Railroad, immediately beyond the forty miles included in said first contract. That on the 18th day of July last, the present plaintiffs, M. T. Seymour, E. S. Alexander, J. O. Rutter, and A. J. Hopper, entered into a contract with defendants by which plaintiffs assumed all the covenants and undertakings of said Hopper, Boyle & Co., in said two contracts of September 7, 1871, and Jan'y 25th, 1872, except as they were modified or changed, by said last mentioned contract.

The original contracts thus assumed *provided* that said work should be done in a substantial and workmanlike manner, to the satisfaction of the Chief engineer of said Railroad Co., and his assistants.

That in doing said work said contractors should conform to and follow the directions and instructions of said engineer, and should progress with the same, at such time, in such manner, and at such particular points on the line as said engineer, and his assistants should direct. That said engineer should be the umpire in cases of dispute between the parties to said contracts.

That in case of failure by said H. B. & Co., to comply with, or perform any stipulation of said contract, Defendant should have the right to cancel the same, in which case H. B. & Co., should have no claim for damages, and 15 per cent. should be forfeited.

That in case H. B. & Co. should neglect to progress with said work, as fast as in the opinion of the engineer of defendant, should be necessary to insure the completion of said work, by the time stipulated, then defendant might elect to declare contract abandoned, balance unpaid forfeited, and might employ other parties to do the work at the cost of H. B. & Co.

That defendant might, when in its opinion necessary, pay laborers employed by, and persons furnishing material or supplies to said H. B. & Co., and deduct the amount thus paid from the amount payable to H. B. & Co.

It was also mutually agreed that defendant should have the right to diminish the force, or stop the work at any time—without any claim for damages, so far as the contract of September 7, was concerned. And the same provision is incorporated into the 2nd contract, except that 30 days notice of such stoppage should be given, and the defendants were bound in case of such stoppage to take hay, grain and provisions of H. B. & Co., on the work at cost.

That said work should be paid for at certain fixed rates for

different kinds of work, in monthly estimates, as the work progressed 85 per cent. to be paid in cash on or about the 15th of every month for all work done the previous month, and the 15 per cent retained should be paid on final certificates by the engineer, of the completion of the work, in all respects, according to the terms of the contract.

Time was also fixed for the completion of the work, but as that is changed, it is not necessary to call attention to it.

As I said before, the plaintiffs assumed these two contracts, embracing in all 160 miles of Railroad, and agreed to perform them in all respects, except as modified by their contract.

The modifications were in substance:

1st. In lieu of all claims for extra work on the first 40 miles, and as a bonus for completing the first 60 miles, by the 15th of September, Defendants were to pay plaintiffs $15,000, cash in hand, and $15000, on completion of the first 60 miles by September 15.

2d. Plaintiffs were to lay all the track for the portion of 160 miles, on which it had not been laid, for which they were to be paid $475 per mile. Defendants to furnish locomotive and cars for the work, and deliver iron and materials at nearest side track.

The original contracts did not include track laying.

3d. The plaintiffs would complete the said work at or within the following time.

1st 40 miles, by the 1st of September, 1872.

3d 20 miles, by the 15th of September, 1872.

4th 20 miles, by the 15th of November, 1872.

5th 20 miles, by the 15th of December, 1872.

6th 20 miles, by 1st of June, 1873.

7th 20 miles, by the 15th of July, 1873.

8th 20 miles, by 1st of October, 1873,

4th. That defendant should have the right to change the quantities of work on the whole line, increasing or diminishing the same at pleasure, and plaintiffs waived all claim for damage by such changes.

5th. That plaintiffs should at all times keep and save defendant harmless against all claims made on defendant or the Railroad Co. for labor, materials or supplies done or furnished for, or on account of plaintiffs, on said work, and would pay all damages and costs which defendant or the Railroad Co., might be required to pay on such claims.

6th. That for corduroy work on first 40 miles, plaintiffs were to be paid 45 cents per sq. yard, and for corduroy work done on remainder of work, plaintiffs were to be paid 40 cents per sq. yard.

7th, That $15,000 bonus to be paid on completion of sixty miles, together with 15 per cent. retained, should be held by defendant as security for completion of third twenty miles.

And fifteen per cent. reserve was to be retained as security for completion of the whole work, and to be forfeited and applied to payment of damages in case of plaintiff's failure to complete work in times specified.

8th. That plaintiffs should keep such force of men and teams on the work as in the opinion of engineer should be sufficient to complete the work on the several sections in the times named, and in default of so doing, engineer might make his

requisition in writing for increase of force, and in case of failure to comply with such requisition, defendant might supply deficiency at cost of plaintiffs.

The declaration then avers that after making the contract of July 18, plaintiffs immediately proceeded to the performance thereof. That they put on a large force of men and teams, and expended large sums of money for tools, materials and supplies. That they sub-let (with consent and approval of defendant,) the west 100 miles of said work, at prices which would have afforded large profit to plaintiffs. That plaintiffs did a large amount of said work to the entire approval of the chief engineer of said road. That plaintiffs so continued to prosecute said work with vigor aud success, and to the satisfaction of defendant and said engineer, up to 15th December last, at which time they had completed 53 miles west from Stevens Point, and had the remaining 7 of the first 60 miles nearly completed, and had a large force at work on other parts of said work; and that when a large sum, to wit, $250,000, was due plaintiffs for said work, defendant notified plaintiffs that it was unable to pay for the work then done, or that might be thereafter done, on said work under said contract, and that defendant has ever since been insolvent and unable to pay, and has ever since utterly refused to pay the sums due plaintiffs for said work.

For the alleged breach of its covenants the plaintiffs claim damages as follows:

1st. For the work actually performed under said contract.

2d. For the cost of hiring and transporting men from Chicago to said work.

3d. The cost of erecting houses and tents along the line of

set forth in the declaration, and the fact of the making of the contracts, as charged, may be taken as admitted.

The first issue material for you to consider, is that raised by the replication to the 5th plea. By this plea the defendant claims, that plaintiffs had broken the covenants in the contract, which they were to perform, and were in default at the time of the alleged breach by defendant. To which plaintiffs have replied, that defendant had excused or waived whatever breaches or violations of the contract had been committed by plaintiffs, prior and up to the time of the alleged breach by the defendant, and that at the time of defendant's alleged breach, plaintiffs were, with the consent of defendant, engaged in fulfilling and performing the contract.

The breaches then complained of in the plea, and which the replication claims were excused or waived, are mainly if not all the failure on the part of plaintiffs to complete the various sections of said road at the times specified by the contract.

There is no doubt in my mind that as a matter of law, the defendant could waive or excuse any breach or violation of the contract, on the part of plaintiffs. The question for you to determine, is whether defendant has so excused or waived such breaches. For there is no pretense that plaintiffs had performed the contract, as far as time was concerned, at the time of the alleged breach of defendant. Indeed the plaintiffs declaration shows that they had not kept their covenants in that regard. For the contract provided that the first 40 miles should be completed by the first of September, 1872. The 3d 20 miles, by the 15th of September, 1872, the 4th 20 miles, by the 15th of November, and 5th 20 miles, by the 15th of December. And the declaration charges that at the time the defendants broke the

contract, by stopping payment, the plaintiffs had only completed 53 miles.

As I just said, the question is whether defendant had waived such default on the part of plaintiffs, and to determine this question of fact, it is your duty to examine and consider all the testimony bearing on that point. It is not necessary that there should be a written waiver, nor even a waiver in express terms, by any set form of words, if you find that from all the conduct of the parties, the waiver, in fact, was made by the acts of the parties. Any acts or conduct of the parties, such as treating the contract as still in full force, paying estimates under it, and according to its terms, are circumstances tending to prove a waiver and excuse, but you are the judges of the weight and conclusiveness of the facts and circumstances from which the alleged waiver is sought to be established. I will say also in this connection that the burden of proving such waiver is on the plaintiffs, and they are bound to make it out by a preponderance of evidence, if there is a conflict on that point.

If from a careful consideration of the evidence, you find that the time fixed by the contract within which the work or certain parts of it was to be completed, had been waived, and that plaintiffs had been expressly or impliedly excused from any default, by reason of not completing the said work at the time fixed by the contract, then you will find the issue on the 5th plea for the plaintiffs, and if that issue is found for the plaintiffs, then the contract would be considered by the court as in full force at the time of the breach, by the defendant.

It will then become your duty to enquire whether the defendant has committed the breach of said contract, set forth in the declaration.

This breach as set out in the declaration, is in substance, that on the 15th of December last, while plaintiffs were engaged in the due prosecution of the work, under the contract, and pursuant to the terms, aud while defendant was largely, to-wit, in the sum of $250,000 indebted to plaintiffs for work done, under the contract, said defendant notified plaintiffs that it was unable to pay plaintiffs the sum due them for said work, or any part thereof, and was wholly destitute of means to make further payments.

By the terms of the contract, the plaintiffs were to be paid by monthly estimates, on the 15th of each month, for the work done the preceding month.

I will not stop to recapitulate the evidence by which the plaintiffs claims to have proved this breach as alleged. You have heard all the proof on that point, and will bear in mind the statements of the various witnesses, who have testified on the point. And if from that evidence, you find that the defendant at any time, on or about the 15th of December, for the precise day is not material, informed plaintiffs, or gave them to understand that they were unable to pay for the estimates then due for work, under the contract, and that it was uncertain or doubtful whether they would be able to pay future estimates, then you will be justified in finding that the breach is proved, and the plaintiff, by reason of such breach, had the right to stop work.

If you find the breach proven, as set forth in the declaration, it will then become your duty to determine the plaintiff's damages, and it is my duty to give you rules by which those damages are to be fixed and determined.

1st. The plaintiffs will be entitled to recover all sums due for work performed under the contract.

This you will ascertain mainly from the estimates and evidence of the chief engineer.

I do not understand that the amount of these estimates is disputed, and for convenience I recapitulate them here, but with the caution to you that you are to determine that amount, and my statement is not binding upon you.

October. For work done in Oct., estimate,	$42,832.49
Novemb'r. Estimate for work done in Nov.,	23,609.23
Final estimate, - - - -	10,042.25
	$76,483.77

But there are certain disputed items claimed by plaintiff in addition to these amounts. The first of these is what is termed the *bonus* of $15,000, due on the completion of the first 60 miles.

By the terms of the contract this sum was to be retained or held by defendant as security for the completion of the first 60 miles. But if the defendant is found guilty of the alleged breach, then as said breach occurred before the 60 miles was completed, and plaintiffs by reason of said breach had the right to abandon the work, then this sum which is held by defendant in the nature of a pledge, should be paid over to plaintiffs, as it would seem to me manifestly inequitable for defendant to retain this sum after it had virtually by its own act put the contract to an end.

So that I charge you that if you find from the evidence that defendant violated the contract, as charged in the declartion, it then became liable to pay the $15,000 over to plaintiffs.

($30,000 had been earned on first 40 miles, and $15,000 paid on execution of July contract, and this $15,000, which was practically plaintiff's money, was only held as security.)

The next item is what is termed the retained percentage of 15 per cent., amounting, as the estimates show, to $19,937.15.

The same reasoning which brings me to the conclusion that the $15,000 *bonus* should be allowed, govern in regard to this item of retained percentage. It is held after the work is done, as security for final completion. That is, it is as so much kept back out of monthly estimates, and if the contract is broken so as to justify the plaintiffs in abandoning the work, then the same should no longer be held.

The next item is the sum of $3,300 charged for 11,000 yards earth work, deducted from the July estimate.

It seems from the evidence of the Chief Engineer that a certain embankment on the first 40 miles, which was constructed by Hopper, Boyle & Co., during the winter of 1871–2, was measured in the winter, and when the frost went out, and the bank settled, it was found to have been over estimated to the extent of about 13,000 cubic yards. About 2,000 cubic yards were filled, and the balance, 11,000 cubic yards, having been paid for to H., B. & Co., was deducted from plaintiff's July estimate, on sections 1 to 40. And a claim is now made that this amount is wrongfully deducted. This was done by the Chief Engineer, under the clause of the contract which made him the umpire and arbiter of all disputes, and as the work on these 40 sections had all been settled for, and receipted in full, prior to the alleged breach, I think plaintiffs are concluded, and cannot claim for this item in this action.

The next item is for extra cost of moving earth by train on sections 42 to 46, $11,708.

You will recollect the evidence on this point. According to Mr. Alexander's testimony, the extra cost of doing this work

was to be paid by defendant, while according to Mr. Phillips' testimony, the increased pay, if any, was to be fixed by the engineer, Capt. Wellman, and Capt. Wellman says he has never fixed such cost, and cannot do it at this time. So that you are to decide upon the testimony of Mr. Alexander and Mr. Phillips, between whom there is a conflict. Not, however, in every particular, but only as to the extent of the extra compensation, if any, because Mr. Phillips agrees that there was talk of the compensation being fixed by the engineer, while Alexander claims it was fixed between them. This being a claim for an extra allowance, not included in any estimate, the plaintiffs are bound to establish it, by a preponderance of proof. The plaintiffs have the laboring oar, and must prove the item, both the performance of the work, and right to the extra pay, by evidence satisfactory to you.

If you find this proven, you will allow it.

If not, you will disallow it.

The next item is $2,167.20, for ties furnished by plaintiffs to defendant, and for which the engineer has returned an estimate in the form of a voucher. If evidence satisfies you that this item is proved, you will allow it.

I have now passed over all the items for work done under the contract, for which plaintiffs make claim, and now come to the special damages claimed by plaintiffs.

The general rule is that the plaintiff in an action like this, can only recover such damages as are the natural consequence of the breach of the contract, of which the defendant is guilty, and the damages must be direct and immediate, and not remote or consequential.

Acting upon this rule I have already, during the trial, excluded from your consideration the plaintiff's claim for expected profits on the unperformed work, including the unperformed track laying and corduroy. But there may be a class of damages disclosed by the proof, to which this objection does not apply. For instance, the evidence shows that a supply road had been cut by plaintiffs at an expense of $5,380.29, as I have the figures.

If you find that this expenditure was made for the purpose of carrying on the road, and that it has become useless to plaintiffs by the act of defendant, you can allow it as damages, to the extent which it has become useless by reason of the breach. What had become useless before, by completion of road, should not be taken into account. Same in regard to houses and lumber. The evidence also tends to show that plaintiffs had had teams, wagons, harness, tools, tents, supplies, &c., &c., some of which they claim were wholly lost to them, and on the rest they suffered a large depreciation.

And as to this part of plaintiff's claim, I instruct you that you may properly allow plaintiffs such sum as is established by the proof to have been the depreciation in value of said property by reason of the stoppage of the work.

Plaintiffs had no right to abandon this property on the stoppage of work, and charge the whole cost or value to defendant as damages, but they should have collected, and sold the same as far as possible.

The real damage is the difference between this property, for the purpose of carrying on the work, and its value after the work stopped.

A reasonable sum should also be allowed for the care of this property, until it could be sold.

Supplies consumed by men while kept on work, at defendants instance, while they were trying to raise money to go on with work, may also be allowed as damages.

Telegraph poles—contract requires them to be placed on line, if not used by plaintiff, defendant should pay for them.

Interest—on fixed sums should be paid at - - 7 per cent.

On the part of defendant, set off is claimed—

1st.	Paid to plaintiff's own men - -	$20,941.04
2d.	Board bills to plaintiff's own men - -	5,927.98
3d.	Whitman & Perkins, item - - -	4,990.60
4th.	Folsom & McConnell's men - -	6,523.13

Defendant has burden of proof, and must clearly establish all these items, and that they are for labor and supplies done, and furnished on plaintiff's work.

5th. Use of road to section 80.

Too uncertain. Phillips testimony withdrawn from jury, on this point as furnishing no reliable rule on which damage could be estimated.

NORTHERN DISTRICT OF ILLINOIS, ss.

I, Wm. H. Bradley, clerk of the Circuit Court of the United States for said Northern District, do hereby certify, that

the foregoing transcript is a correct copy of the original copy, in pencil of the charge of the Hon. Henry W. Blodget, to the jury, on the trial of said cause of Mark T. Seymour, *et al*, vs. Philips & Colby Construction Company, as furnished me by said Judge.

In testimony whereof, I have hereunto set my hand,
[SEAL] and affixed the seal of said court at my office in Chicago, in said district, this 27th day March A. D. 1875.

WM. H. BRADLEY, Clerk.